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No. 02-1674 *et al.*

IN THE

# Supreme Court of the United States

MITCH MCCONNELL *et al.*,

*Appellants,*

v.

FEDERAL ELECTION COMMISSION *et al.*,

*Appellees.*

**On Appeal From The United States District Court For The District of Columbia**

## SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

## VOLUME I


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UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

[May 1, 2003]

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SENATOR MITCH MCCONNELL, *et al.*,
*Plaintiffs*,
v.
FEDERAL ELECTION COMMISSION, *et al.*,
*Defendants*.
NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*,
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*Defendants*.
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v.

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*Defendants*.

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## MEMORANDUM OPINION

PER CURIAM [1]

Presently before this three-judge District Court are eleven consolidated actions challenging as unconstitutional the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA") and seeking declaratory and injunctive relief to prohibit its enforcement. The wide range of legal challenges raised by this litigation are highly complex, interrelated, and raise issues of fundamental importance not only to the conduct and financing of federal election campaigns but to the other rights involved that we enjoy under the Constitution. Because of the complexity of our positions, this *per curiam* opinion, by Judge Kollar-Kotelly and Judge Leon, includes a schematic description of the three-judge panel's conclusions in regard to each of BCRA's challenged provisions and a chart as to the rulings on each provision's constitutionality. The *per curiam* opinion also includes: (1) a brief history of campaign finance regulation in the United States (pp. 16-42); (2) the legislative history behind BCRA's enactment (pp. 42-50); (3) a procedural history of the litigation in this case (pp. 50-57); (4) a description of the specific provisions in BCRA at issue in these lawsuits (pp. 57-80); (5) certain Findings of Fact relating to the identities of the parties and BCRA's disclosure provisions (pp. 80-106); and (6) conclusions of law relating to claims of the Paul Plaintiffs and most of BCRA's disclosure provisions (pp. 106-170). The separate opinions of each judge hearing this matter follow thereafter.

### I. DESCRIPTION AND CHART OF THE COURT'S RULINGS

In light of the number of provisions in BCRA being challenged, the complexity of the issues presented by each

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[1] Judge Henderson does not join this opinion.

challenge, and the variety of positions and voting combinations taken by the three judges on this District Court, we set forth a brief description and a chart, on a section by section basis, of the various rulings

A. *Title I*

Section 323(a) of BCRA bans national parties from soliciting, receiving, directing, transferring, and spending nonfederal funds (*i.e.*, soft money). Judge Henderson strikes this section down as unconstitutional in its entirety. Judge Leon, for different reasons, files a concurrence, joining with Judge Henderson, except with respect to the ban on national parties from using (*i.e.*, "directing," "transferring," and "spending") nonfederal funds (*i.e.*, soft money) for "federal election activity" of the type defined in Section 301(20)(A)(iii). As to that type of conduct, Judge Leon upholds the constitutionality of Congress's ban on the use of nonfederal funds by national parties for Section 301(20)(A) (iii) communications. Judge Kollar-Kotelly upholds Section 323 (a) in its entirety. Accordingly, Judge Leon's decision regarding Section 323(a) controls.

Section 323(b) prohibits state parties from using nonfederal money for "federal election activities" as defined in Section 301(20)(A) of BCRA. Judge Henderson strikes these sections down as unconstitutional in their entirety. Judge Leon, for different reasons, joins Judge Henderson in a separate concurrence, but only with respect to those party activities set forth in Subsections (i), (ii), and (iv) of Section 301(20)(A). As to Section 301(20)(A)(iii), Judge Leon upholds the constitutionality of Congress's prohibition on state and local parties from spending nonfederal funds for communications that promote, oppose, attack or support a specific federal candidate. In a separate opinion, Judge Kollar Kotelly finds Section 323(b) constitutional and concurs with Judge Leon's discussion of Section 301 (20)(A)(iii).



Section 323(d) prohibits national, state, and local parties from soliciting funds for, or making donations, to § 501(c) organizations that make expenditures, or disbursements, in connection with federal elections, or to § 527 national organizations. Judge Henderson strikes this section down as unconstitutional in its entirety. Judge Leon, for different reasons, joins in that conclusion in a separate concurrence. Judge Kollar-Kotelly files a separate dissent in which she finds the entire section constitutional.

Section 323(e) prohibits, but for certain enumerated exceptions, federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending, nonfederal money in connection with any local, state, or federal election. Judge Henderson and Judge Kollar-Kotelly, for different reasons, in separate opinions uphold the constitutionality of this section in its entirety. Judge Leon concurs with respect to the restriction on federal officeholders and candidates receiving, directing, transferring or spending any nonfederal funds in connection with any federal or state election, but files a separate dissent with regard to any prohibitions on a federal candidate, or officeholder, from soliciting funds for the national parties.

Section 323(f) prohibits state officeholders and candidates from using nonfederal funds for public communications that refer to a clearly identified candidate for federal office and that promote, oppose, attack, or support a candidate for this office. Judge Leon upholds this section in its entirety. Judge Kollar-Kotelly concurs with Judge Leon's opinion. Judge Henderson, dissents and finds the entire section unconstitutional.

B. *Title II*

Section 201 of BCRA sets forth a primary, and "backup" definition, of an "electioneering communication" (*i.e.*, so-called "issue ads"). In addition, it sets forth certain disclosure

requirements for those who fund these electioneering communications. Judge Henderson strikes down both the primary and backup definition as unconstitutional. Judge Leon, for different reasons, concurs in her judgment with respect to the primary definition. Judge Kollar-Kotelly dissents and upholds the primary definition as constitutional as discussed in her separate opinion. With respect to the backup definition, Judge Leon, who writes a separate opinion, upholds its constitutionality with its final clause severed. Judge Kollar-Kotelly, as expressed in her opinion, concurs in that conclusion solely as an alternative to this Court's finding that the primary definition is unconstitutional. Finally, with regard to Section 201's disclosure requirements, Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, uphold their constitutionality with one exception. Judge Henderson strikes down the disclosures requirements in a separate dissent.

Section 202 provides that disbursements by persons for electioneering communications, or contracts to purchase the same, that are coordinated with either a federal candidate or a candidate committee, or a political party committee will be treated as contributions to that candidate's campaign or political party committee. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, find this section constitutional. Judge Henderson, in a separate dissent concludes that this Section is unconstitutionally overbroad.

Section 203 of Title II prohibits labor unions, corporations and national banks from using money from their general treasury to fund "electioneering communications," as defined by Section 201. Instead, under Section 203, such communications must be paid from a separately segregated fund ("SSF"). Section 203 also includes an exception from the SSF requirement for certain nonprofit corporations (*i.e.*, the "Snowe-Jeffords exception"). Judge Kollar-Kotelly



upholds this section as constitutional. Judge Leon joins Judge Kollar-Kotelly's opinion upholding the constitutionality of this section as it applies to the backup definition in Section 201. Judge Henderson strikes down this Section as unconstitutional in its entirety. Judge Kollar-Kotelly and Judge Leon additionally uphold the disclosure and SSF requirements as well as the Snowe- Jeffords exemption provision for certain nonprofit corporations organized under Sections 501(c)(4) and 527 of the Internal Revenue Code in their respective opinions.

Section 204 ("The Wellstone Amendment"), in effect, withdraws the Snowe- Jeffords exception of Section 203. Judge Henderson strikes down Section 204 in its entirety. Judge Leon concurs in her result as it applies to MCFL exempt organizations only. As to nonprofit corporations that do not qualify for the MCFL exemption, Judge Leon concurs with Judge Kollar-Kotelly's conclusion, but for different reasons, in upholding Section 204 as it applies to non MCFL organizations.

Section 212 provides certain reporting requirements for independent expenditures. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, conclude that challenge to this provision is not ripe for review, and therefore hold that the Court does not have jurisdiction to resolve the plaintiffs' challenges at this time. Judge Henderson dissents from this view and finds Section 212 unconstitutional in its entirety.

Section 213 requires national parties, in essence, to choose between making coordinated expenditures under the Party Expenditures Provision or unlimited independent expenditures on behalf of their federal candidates. All three judges concur that this section is unconstitutional. Judge Henderson's opinion includes a discussion of her separate reasons. Judge Kollar-Kotelly concurs in Judge Leon's separate opinion on this section.

Section 214 addresses coordinated expenditures paid for by persons other than party committees and candidate committees. Section 214 repeals the current FEC regulations on coordinated expenditures, and directs the FEC to promulgate new regulations that do not require "an agreement or formal collaboration to establish coordination." Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, find that the plaintiffs' challenge under Section 214(b) and Section 214(c) is nonjusticiable and the Court therefore lacks jurisdiction to consider their challenge. As to Sections 214(a) and 214(d), however, they find those sections constitutional for the reasons set forth in the *per curiam* opinion. Judge Henderson dissents, finding the Section unconstitutional in its entirety.

C. *Title III and V*

Sections 304, 316, & 319, collectively known as the "Millionaire Provisions," allow opponents of self-financed candidates, and in certain circumstances, to raise money in larger increments and accept unlimited coordinated party expenditures. All three judges conclude, for the reasons set forth in Judge Henderson's opinion, that this Court lacks standing to entertain challenges to these provisions.

Section 305 denies a candidate the "lowest unit charge" for broadcast advertisements on radio and television unless the candidate promises not to refer to another candidate in his or her advertisements. For the reasons set forth in Judge Henderson's opinion, all three judges conclude that this Court lacks standing to entertain the plaintiffs' challenge at this time.

As explained in Judge Henderson's opinion, the Court similarly finds that the plaintiffs do not have standing to challenge Section 307, which increases and indexes contribution limits.



Section 311 establishes certain disclosure requirements for the sponsors of electioneering communications. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, uphold this provision as constitutional. Judge Henderson, dissents, and finds this section unconstitutional for the reasons set forth in her opinion.

Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional. Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Section 504 requires broadcast licenses to collect and disclose records of any request to purchase broadcast time for communications that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to federal office," and "a national legislative issue of public importance." Judge Henderson finds this section unconstitutional. Judge Leon and Judge Kollar-Kotelly, concur in that result, but not in her reasoning. Judge Kollar-Kotelly concurs in Judge Leon's separate opinion on this section.

Chart of the Court's Rulings

| BCRA Provision | Constitutional | Unconstitutional | Nonjusticiable |
|---|---|---|---|
| 323(a): nonfederal fund restrictions on national parties | Judge Kollar-Kotelly<br>Judge Leon (only as to using nonfederal funds for 301(20)(A)(iii) activities | Judge Henderson<br>Judge Leon (except as to using nonfederal funds for 301(20)(A)(iii) activities | |
| 323(b): nonfederal fund restrictions on "federal election activity" by state and local parties | Judge Kollar-Kotelly<br>Judge Leon (only as to 301(20)(A)(iii) activities | Judge Henderson<br>Judge Leon (only as to 301(20)(A)(i),(ii),(iv) activities) | |
| 301(20): definition of "federal election activity" | Judge Kollar-Kotelly<br>Judge Leon (only as to 301(20)(A)(iii)) | Judge Henderson<br>Judge Leon (only as to 301(20)(A)(i),(ii),(iv)) | |



| BCRA Provision | Constitutional | Unconstitutional | Nonjusticiable |
|---|---|---|---|
| 323(d): nonfederal fund restrictions on tax-exempt organizations | Judge Kollar-Kotelly | Judge Henderson<br>Judge Leon | |
| 323(e): nonfederal fund restrictions on federal candidates | Judge Henderson<br>Judge Kollar-Kotelly<br>Judge Leon (except solicitation of non-federal funds | Judge Leon (only as to solicitation of non-federal funds) | |
| 323(f): nonfederal fund restrictions on state candidates | Judge Kollar-Kotelly<br>Judge Leon | Judge Henderson | |

| BCRA Provision | Constitutional | Unconstitutional | Nonjusticiable |
|---|---|---|---|
| 201: "electioneering communication" definition | Judge Kollar-Kotelly (primary definition and, in the alternative, back-up definition)<br>Judge Leon (backup definition only) | Judge Henderson (primary and backup definitions)<br>Judge Leon (only as to primary definition) | |
| 201: disclosure of "electioneering communications" | Judge Kollar-Kotelly (severing subsection (5))<br>Judge Leon (severing subsection (5)) | Judge Henderson<br>Judge Kollar-Kotelly (subsection (5) only)<br>Judge Leon (subsection (5) only) | |
| 202: coordinated "electioneering communications" as contributions | Judge Kollar-Kotelly<br>Judge Leon | Judge Henderson | |

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| BCRA Provision | Constitutional | Unconstitutional | Nonjusticiable |
|---|---|---|---|
| 203: prohibition of "electioneering communications" by corporations and unions | Judge Kollar-Kotelly<br>Judge Leon (as to backup definition) | Judge Henderson | |
| 204: nonprofit organization exception ("Wellstone Amendment") | Judge Kollar-Kotelly<br>Judge Leon (as to non-MCFL groups) | Judge Henderson<br>Judge Leon (as to MCFL groups) | |
| 212: disclosure of independent expenditures | | Judge Henderson | Judge Kollar-Kotelly<br>Judge Leon |
| 213: choice between independent and coordinated expenditures | | Judge Henderson<br>Judge Kollar-Kotelly<br>Judge Leon | |

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| BCRA Provision | Constitutional | Unconstitutional | Nonjusticiable |
|---|---|---|---|
| 214: definition of coordinated communications | Judge Kollar-Kotelly (as to 214(a) and 214(d))) Judge Leon (as to 214(a) and 214(d)) | Judge Henderson | Judge Kollar-Kotelly (as to remainder of 214) Judge Leon (as to remainder of 214) |
| 304, 316, & 319: "Millionaire Provisions" | | | Judge Henderson Judge Kollar-Kotelly Judge Leon |
| 305: limitation on lowest unit charge for candidates referring to other candidates | | | Judge Henderson Judge Kollar-Kotelly Judge Leon |



| BCRA Provision | Constitutional | Unconstitutional | Nonjusticiable |
|---|---|---|---|
| 307: increased contribution limits and indexing of limits | | | Judge Henderson Judge Kollar-Kotelly Judge Leon |
| 311: identification of sponsors | Judge Kollar-Kotelly Judge Leon | Judge Henderson | |
| 318: prohibition of donations by minors | | Judge Henderson Judge Kollar-Kotelly Judge Leon | |
| 504: disclosure of broadcasting records | | Judge Henderson Judge Kollar-Kotelly Judge Leon | |

## II. BACKGROUND

It is necessary to canvass the history of federal campaign finance regulation in order to provide the appropriate context for understanding the structure and practices of federal campaign finance that Congress confronted when it enacted BCRA. *See United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) ("*UAW*") ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal

problems before us."). Following this overview, the Court will move to a discussion of the legislation enacted by Congress to resolve the perceived shortcomings of the pre-BCRA campaign finance structure and a procedural history of the litigation in this case.

A. *The Framework of Federal Campaign Finance Regulation*

One might be tempted to agree with Plaintiffs' assertion that the history of federal campaign finance regulation is "relatively short," McConnell Br. at 9, if one were comparing it to the history of Western civilization. In the judgment of Judge Kollar-Kotelly and Judge Leon, however, the history of federal campaign finance regulation, having its origins in the Administration of President Theodore Roosevelt, is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic.

At the close of the nineteenth century, the concentration of the nation's wealth in the hands of a "small portion of the population" began to threaten the stability and integrity of the political system. *UAW*, 352 U.S. at 570 (quoting 2 Morrison and Commager, *The Growth of the American Republic* at 355 (4th ed. 1950)). At the time, the widely accepted view was that "aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Id.* To that end, many states began experimenting with disclosure laws requiring candidates and their political committees to make public the sources and amounts of contributions to their campaigns and the amounts of their campaign expenditures. *Id.* at 570-571. These laws proved to be largely futile. *Id.* at 571.

Concern with both the size and source of campaign funds relating to the 1904 presidential campaign "crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *Id.* at 571-72. President



Roosevelt's presidential messages to Congress in both 1905 and 1906, strongly encouraged Congress to enact a law prohibiting political contributions by corporations. 40 Cong. Rec. 96 (1905); 41 Cong. Rec. 22 (1906). In response to these concerns, Congress enacted the Tillman Act, Ch. 420, 34 Stat. 864, which prohibited corporations from making any contribution in connection with any election for federal office and which represented "the first concrete manifestation of a continuing congressional concern for elections free from the power of money." *UAW*, 352 U.S. at 575 (internal quotation marks and citation omitted). The Tillman Act demarcates the beginning of the "modern era" of federal campaign finance regulation and is the predecessor of the prohibition on corporate and labor union contributions and expenditures in connection with any federal election from their general treasuries that appears in the Federal Election Campaign Act ("FECA"). *Buckley v. Valeo*, 519 F.2d 821, 904 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).[2] The "underlying philosophy" of the Tillman Act was "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *UAW*, 352 U.S. at 575.

In 1909, Congress endeavored to broaden the Tillman Act by including within the Act's scope, state legislative races and in-kind contributions. *See id.* While this effort ended in failure, in 1910, Congress "translated popular demand for further curbs upon the political power of wealth into a

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[2] The ban on corporate and labor union contributions and expenditures was eventually codified at 18 U.S.C. § 610, and later transferred to the Federal Election Campaign Act, 2 U.S.C. 441b, when Congress re-evaluated the Act in the aftermath of the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475. *See also* S. Rep. No. 677, 94th Cong., 2d Sess. 2-3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 929, 930-31.

publicity law that required committees operating to influence the results of congressional elections in two or more States to report all contributions and disbursements and to identify contributors and recipients of substantial sums." *Id.* (citing Act of June 25, 1910, ch. 392, § § 5-6, 36 Stat. 822, 823) (disclosure required of all transactions greater than $100). The 1910 law further directed the reporting of expenditures exceeding $50, made independently of a political committee for the purpose of influencing congressional elections in more than one State. Act of June 25, 1910, ch. 392, § § 7, 36 Stat. 824. In 1911, Congress further amended the 1910 Act, and for the first time, included overall expenditure ceilings on campaigns for the House ($5,000) and for the Senate ($10,000). *Buckley*, 519 F.2d at 904-905 (citing Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 26). Additionally, the 1911 provisions required all candidates for the Senate and the House of Representatives to make detailed reports with respect to their nominating and election campaigns. *UAW*, 352 U.S. at 576. Hence, candidate disclosures included primary, convention, and other pre-nomination periods. *Buckley*, 519 F.2d at 905. The 1911 law also prohibited candidates from promising employment for the purpose of securing an individual's support. *UAW*, 352 U.S. at 576 (citing 37 Stat. 25). In 1918, Congress again amended the law and added criminal penalties for offering anything of value to influence voting. *Id.* (citing Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013).

In the only instance of a criminal prosecution under the Act, Truman Newberry was convicted in Michigan of violating the expenditure ceiling in his 1918 primary campaign for the United States Senate. Newberry's conviction was overturned by the Supreme Court in 1921. The Court invalidated the law insofar as it extended to Senate primary elections. *Newberry v. United States*, 256 U.S. 232, 258 (1921) ("We cannot conclude that authority to control party primaries or conventions for designating candidates was



bestowed on Congress by the grant of power to regulate the manner of holding elections."). Four Justices of the Court held that primaries were intra-party affairs not amenable to congressional regulation under the Elections Clause. *Id.* Justice Joseph McKenna, who provided the crucial fifth vote for judgment, limited the reach of the decision to the facts by concluding that the statute under consideration was enacted prior to the Seventeenth Amendment and, therefore, left open the question of whether that Amendment gave Congress authority to regulate Senate primary elections. *Id.*

In 1925, in the wake of *Newberry*, Congress passed the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070, which was a comprehensive amalgamation of the surviving provisions of the existing campaign finance laws. *UAW*, 325 U.S. at 576. The Federal Corrupt Practices Act strengthened the Tillman Act by broadening the definition of contribution, extending the ban on corporate contributions to Delegates and Resident Commissioners that were elected to Congress, and punishing the recipient of any illegal contribution in addition to the contributor. *Id.* at 577. The law also generally broadened disclosure provisions. *Buckley*, 519 F.2d at 905.

The Supreme Court upheld the Federal Corrupt Practices Act in the *Burroughs* case of 1934:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone. Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the

> corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in section 244, that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

*Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (internal citation omitted). As is obvious from this language, the *Burroughs* opinion provided Congress with broad discretion to regulate federal elections including the financing of campaigns.

The next instance of congressional action in the area of campaign finance was in 1940 when Congress amended the Hatch Act, a law which placed restrictions on the political activities of the civil service, by making it unlawful for any political committee to receive contributions totaling more than $3,000,000 or to make expenditures of more than that amount in any calendar year. *UAW*, 352 U.S. at 577 (citing Act of July 19, 1940, ch. 640, 54 Stat. 767). The Hatch Act amendments also limited gifts to candidates or political committees to $5,000 in any calendar year. *Buckley*, 519 F.2d at 905 (citing Act of July 19, 1940, ch. 640, 54 Stat. 767).

One year later, the Supreme Court again returned to the question it had squarely addressed in *Newberry:* namely whether congressional power under the Elections Clause extended to the pre-election period. *United States v. Classic*, 313 U.S. 299 (1941). This time, the Court upheld the congressional enactment holding that "the authority of Congress, given by [Article I, section 4], includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress." *Id.* at 317. The case involved a Louisiana Democratic primary for the House of Representatives, which history showed was the determinant of who



would win the general election. *Id.* at 314. The Supreme Court in *Classic* disregarded *Newberry* because only four Justices in *Newberry* had adopted the view that the Elections Clause forbade congressional regulation of primary elections. Consequently, as the issue had never "been prejudged by any decision of [the Supreme] Court," *Classic* overruled the *Newberry* plurality. *Id.* at 317; *see also id.* at 325 n.8 ("No conclusion is to be drawn from the failure of the Hatch Act, to enlarge § 19 by provisions specifically applicable to primaries. Its failure to deal with the subject seems to be attributable to constitutional doubts, stimulated by *Newberry v. United States*, which are here resolved.") (internal citations omitted). Under *Classic*, Congress was given authority to impose criminal penalties for activities of state officials conducting a primary election for federal candidates under the auspices of state law. *See id.* at 307.

Following the rise of organized labor during World War II, in 1943, Congress passed the Smith-Connally Act which included a section that extended the Federal Corrupt Practices Act to organized labor. *UAW*, 352 U.S. at 578 (citing War Labor Disputes Act (Smith-Connally Act), ch. 144, § 9, 57 Stat. 163, 167) ("Wartime strikes gave rise to fears of the new concentration of power represented by the gains of trade unionism. And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process."). Congressman Gerald Landis, the author of this provision in the Smith-Connally Act observed that "[t]he public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials." *Id.* at 579 (quoting Hearings before a Subcommittee of the

House Committee on Labor on H.R. 804 and H.R. 1483, 78th Cong., 1st Sess. 1, 2, 4).

Despite the provision in the Smith-Connally Act tightening the reins on political activity of labor unions, Congress was prompted to investigate "enormous" financial outlays by some unions in connection with the 1944 national elections. *Id.* The Senate's Special Committee on Campaign Expenditures investigated and concluded that while there was "'no clear-cut violation of the Corrupt Practices Act,'" *id.* at 580 (quoting S. Rep. No. 101, 79th Cong., 1st Sess. 23), the law was being evaded by large scale spending by labor unions on expenditures (as opposed to contributions), which were not explicitly prohibited by the Federal Corrupt Practices Act, *id.*[3] Congress, it appears, considered a prohibition on contributions to be equally applicable to expenditures. *Id.* at 582 ("'The committee is firmly convinced, after a thorough study of the provisions of the act, the legislative history of the same, and the debates on the said provisions when it was pending before the House, that the act was intended to prohibit such expenditures.'") (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40). In commenting on how this exception threatened to eviscerate the Federal Corrupt Practices Act, the House Committee studying this problem stated that "'[t]he intent and purpose of the provision of the act

[3] A sampling of the extraordinary size of the expenditures by labor on federal elections demonstrates that "One [labor organization] was found to have an annual budget for 'educational' work approximating $1,500,000, and among other things regularly supplies over 500 radio stations with 'briefs for broadcasters.' Another, with an annual budget of over $300,000 for political 'education,' has distributed some 80,000,000 pieces of literature, including a quarter million copies of one article. Another, representing an organized labor membership of 5,000,000, has raised $700,000 for its national organizations in union contributions for political 'education' in a few months, and a great deal more has been raised for the same purpose and expended by its local organizations.'" *UAW*, 352 U.S. at 580-81 (quoting H.R. Rep. No. 2093, 78th Cong., 2d Sess. 3).



prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit [directly] contributing to a candidate and yet permit the expenditure of large sums in his behalf?" *Id.* at 581 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40).

Therefore, in order to prevent further "evasion" and to "plug the existing loophole," Congress "again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power." *Id.* at 582 (internal quotation and citations omitted). Accordingly, in 1947, Congress passed the Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136, which amended the Federal Corrupt Practices Act "to proscribe any 'expenditure' as well as 'any contribution' [and] to make permanent [its] application to labor organizations" in addition to corporations. *Id.* at 582-83. The Taft-Hartley Act implemented *Classic* by applying its provisions to primary elections. *Buckley*, 519 F.2d at 906.

Following the Taft-Hartley Act, from the late 1940's through the end of the 1950's, Congress sought unsuccessfully to amend the dollar expenditure limits to reflect more "realistic" costs, but no action was taken. *Id.* In 1960, the Senate passed a bill that strengthened reporting requirements for candidates and political committees, adopted individual contribution limits, rationalized current expenditure limits, and placed ceilings on Presidential campaigns. *Id.* The bill, however, died for lack of a companion in the House of Representatives. *Id.* In 1962, President Kennedy's Commission on Campaign Costs recommended "tax incentives and credits for small political contributions, realistic ceilings, and suspension of the equal time provision as to media debates."

*Id.* In 1966, Congress passed a one dollar tax checkoff to provide public funding for Presidential general elections, which was later repealed in 1967. *Id.*

Late in 1971, Congress reinstituted the tax form checkoff to finance Presidential general elections and, in early 1972, passed the Federal Elections Campaign Act of 1971, Pub. L. No. 92-255, 86 Stat. 3 ("FECA"), requiring disclosure of all contributions in excess of $100 and disclosure of expenditures by all candidates and political committees spending more than $1000 per year. *Id.* The 1971 law also expressly provided corporations and unions with the ability to establish and administer separate, segregated funds for the purpose of making political contributions and expenditures. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 410 (1972).

Despite passage of FECA, the "infinite ability" to "eviscerate[] statutory limitations on contributions and expenditures," which amounted to "wholesale circumvention" became a source of further congressional concern. *Buckley*, 519 F.2d at 837. Congress concluded that costs for federal elections had increased at an "'alarming'" rate. *Id.* (quoting H.R. Rep. No.93-1239, 93d Cong., 2d Sess. 3 (1974), U.S. Code Cong. & Admin. News 1974, p. 5587). Congress was further troubled by the "interaction" between large-scale campaign expenditures and a reliance "on large contributions from monied and special interests." *Id.* In *Buckley*, it was undisputed that "one percent of the people accounted for 90 percent of the dollars contributed to federal candidates, political parties and committees." *Id.* (citing agreed to Findings of Fact). It was also undisputed that illegal contributions to both parties were made in 1972 by Gulf Oil and by American Milk Producers, Inc., a large dairy cooperative. *Id.* at 838. Notably, the circuit court in *Buckley* concluded:

> Large contributions are intended to, and do, gain access to the elected official after the campaign for consideration of the contributor's particular concerns. Senator Mathias not only describes this but also the corollary, that the feeling that big contributors gain special treatment produces a reaction that the average American has no significant role in the political process.



*Id.*; *see also id.* n.32 ("Congress found and the District Court confirmed that such contributions were often made for the purpose of furthering business or private interests by facilitating access to government officials or influencing governmental decisions, and that, conversely, elected officials have tended to afford special treatment to large contributors.") (citations omitted). Indeed, the lower *Buckley* court documented the "lavish contributions by groups or individuals with special interests to legislators from both parties." *Id.* at 840 n.37.

In 1974, in direct response to the 1972 elections which were a "watershed for public confidence in the electoral system," *id.* at 840, and the "shock of its aftermath," *id.* at 837, Congress enacted and President Gerald Ford signed the sweeping FECA Amendments of 1974. *Id.* Broadly speaking, the amendments imposed dollar limitations on contributions by individuals and by political committees to candidates for federal office, to political party committees, and to independent political committees. 2 U.S.C. § 441a(a). The 1974 amendments also imposed limits on expenditures that individuals, candidates, political committees, and political parties could spend to help federal candidates win elections. Moreover, the law treated expenditures that were "coordinated" with a candidate as contributions. 2 U.S.C. 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."). The amendments also included a variety of recordkeeping and disclosure requirements. *See* 2 U.S.C. § § 432-434. The Federal Election

Commission was also created by the amendments and tasked with monitoring and enforcing the campaign finance laws. *See generally* 2 U.S.C. § § 437c(b)(1), 437d(a), 437g. Finally the law, as amended, provided public funding primarily for qualified presidential candidates and some public funding for nominating conventions of major political parties.

The first day after the FECA amendments went into effect, the law was challenged. *Buckley*, 519 F.2d at 901. In a lengthy opinion, the United States Court of Appeals for the District of Columbia Circuit found all but one of the provisions of FECA constitutional. *Id.* at 843-44 (striking down disclosure provision 2 U.S.C. § 437a). In 1976, the Supreme Court affirmed in part and reversed in part the D.C. Circuit's ruling in its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Generally speaking, in examining FECA's provisions against the free speech and association provisions of the First Amendment the Supreme Court found constitutional FECA's contribution limitations, *Buckley*, 424 U.S. at 23-38, and unconstitutional those provisions of FECA that imposed expenditure limitations, *id.* at 39-59. The contribution-expenditure dichotomy first developed in *Buckley* was grounded in the Supreme Court's view that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21 (observing that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."). Expenditure restrictions, on the other hand, "while neutral as to the ideas expressed, limit political expression at the core of our electoral process and of the First Amendment freedoms." *Id.* at 39 (internal quotation marks and citation omitted).



In *Buckley*, the Supreme Court upheld as well the general disclosure provisions contained in FECA. *Id.* at 60-84.[4] The Supreme Court likewise found constitutional the public funding scheme for presidential candidates. *Id.* at 85-109. Finally, the Supreme Court struck down the structure of the FEC as it was constituted under FECA in violation of the Appointments Clause of the Constitution. *Id.* at 109-143.

Hence, in the aftermath of *Buckley*, it was FECA's contribution restrictions that remained intact, while its expenditure provisions were vitiated.[5] Under FECA, as it emerged from *Buckley*, no "person"[6] was permitted to contribute in excess of $1,000 to a candidate for federal office, 2 U.S.C. § 441a(a)(1)(A); no person could contribute to the political committees established and maintained by a national political party, in any calendar year which, in the aggregate, exceed $20,000, 2 U.S.C. § 441a(1)(B); and no person could contribute to any other political committee in any calendar year which, in the aggregate, exceed $5,000,2 U.S.C. § 441a(a)(1)(C).[7] In addition, no multicandidate politi-

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[4] The D.C. Circuit's decision striking down 2 U.S.C. § 437a was not appealed to the Supreme Court. *Buckley*, 424 U.S. at 11 n.7.

[5] Following *Buckley*, there have been a number of important Supreme Court opinions that have addressed application of *Buckley* in other contexts. It is more appropriate to discuss these cases in the context of each Judge's separate opinion.

[6] FECA defines "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11).

[7] Under BCRA, these contribution limits have been raised. Persons can now contribute $2,000 to candidates and $25,000 to national political party committees. BCRA § § 307(a)(1), 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1). Also under BCRA, Congress has carved state party committees out of § 441a(a)(1)(C) and increased the contribution limit for state party committees from $5,000 to $10,000. BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1). Moreover, the contribution limits

cal committee could contribute in excess of $5,000 to a candidate for federal office. 2 U.S.C. § 441a(a)(2)(A); no multicandidate political committee could contribute in excess of $15,000 to the political committees established and maintained by a national political party, 2 U.S.C. § 441a(a)(2)(B);and finally, no multicandidate political committee could contribute to any other political committee in any calendar year which, in the aggregate, exceeded $5,000, 2 U.S.C. § 441a(a)(2)(C). In order to "prevent evasion" of these limitations *Buckley* upheld the Act's $25,000 limitation on total contributions during any calendar year. *Buckley*, 424 U.S. at 38. As a result, under 2 U.S.C. § 441a(a)(3), no individual was permitted to make contributions aggregating more than $25,000 in any calendar year. 2 U.S.C. § 441a(a)(3).[8] In addition, under 2 U.S.C. § 441b, corporations and labor unions are prohibited from using their general treasury funds to "make a contribution or expenditure in connection with any election to any political office." 2 U.S.C. § 441b(a). In sum, the Supreme Court found that:

> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

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applicable to candidates and national party committees have been indexed to the consumer price index and will increase with inflation. BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c).

[8] BCRA has increased the aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates. BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3).



*Buckley*, 424 U.S. at 21-22. Indeed, what emerged from *Buckley* was a tightly focused regime whereby contributions (and coordinated expenditures) to candidates and political parties and committees were limited or even banned (in the case of corporate and union treasury funds) and independent political advocacy was left unimpeded.

Contribution is defined in FECA as including, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

Since the adoption of FECA, it is clear that the Commission has struggled with interpreting the phrase "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In 1975, the FEC examined the case of a local party committee that had established separate accounts for federal funds and for corporate contributions which were permitted under state law, but which were prohibited by federal law for use in connection with federal elections. In Advisory Opinion 1975-21, the Commission determined that the appropriate course was to have the local party allocate both its administrative expenses and its voter registration drives between the two accounts, given that these expenses had an impact on both state and federal elections. FEC Advisory Op. 1975-21 (allocation based on the ratio of "the total amount which the [local party] directly contributes to and expends on behalf of Federal candidates, to . . . the total of all direct contributions to and expenditures on behalf of all candidates-Federal, State, and local"). The FEC slightly reversed course, in Informational Letter 1976-72, where it determined that voter registration efforts could not be paid for from an account containing funds raised from corporate and union general treasuries. FEC Informational Letter 1976-72 ("Thus, even though the Illinois law apparently permits corporate contributions for State elections, corporate/union treasury funds may not be used to fund any portion

of a registration or get-out-the-vote drive conducted by a political party.").

However, in its 1977 rulemakings implementing FECA, the Commission permitted any political committee to make a choice between creating a separate federal account for its federal election activities, or to establish a single account containing only funds subject to the federal contribution limits to finance all of its activities with respect to both state and federal elections. 11 C.F.R. § 102.6(a)(2) (1977). To the extent that segregated accounts were created, the committees were required to "allocate administrative expenses on a *reasonable basis* between their Federal and non-Federal accounts in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis." 11 C.F.R. § 106.1(e)(1977) (emphasis added). The following year, the Commission essentially reversed its 1976 advisory opinion and in Advisory Opinion 1978-10, determined that "the costs of [voter] registration and get-out-the-vote drives" by a state party committee "should be allocated between" federal and nonfederal accounts "in the same manner as other general party expenditures" under the Commission's 1977 regulations. FEC Advisory Op. 1978-10. In Advisory Opinion 1979-17, the Commission extended the conclusions reached in Advisory Opinion 1978-10 regarding separate accounts to the national party committees. FEC Advisory Op. 1979-17 ("[Regulations] thus would permit the RNC to establish and administer separate, segregated bank accounts through an auxiliary organization of the national party which accounts could be used for the deposit and disbursement of funds designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective 'Federal office.'") (citation omitted).

Accordingly, by the middle of 1979, the FEC permitted national and state party committees to solicit and accept



donations outside of FECA's source and amount limitations ("nonfederal money")[9] provided that these monies were placed in separate accounts from the federal funds. In other words, political committees were permitted to establish two sets of accounts-one for federally- regulated money (federal accounts) and one for non-federally regulated money (nonfederal accounts).[10]

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[9] There is a degree of skirmishing in the briefs over the appropriate terminology for "nonfederal money." Defendants use the phrase "soft money." Plaintiffs refer to "soft money" as "state-regulated" or "nonfederal" money. The Court has, for the most part, adopted the nomenclature "nonfederal" money because that is the term that the FEC has used during the rulemaking process implementing BCRA, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002) ("Because the term 'soft money' is used by different people to refer to a wide variety of funds under different circumstances, the Commission is using the term 'non-Federal funds' in the final rules rather than the term 'soft money.'"), even though BCRA uses the term "soft money," BCRA § 101 (entitled "*Soft money* of political parties") (emphasis added) and even though on occasion the Supreme Court has also used the phrase "soft money," *see, e.g., Colorado Republican Federal Campaign Committee v. FEC ("Colorado I")*, 518 U.S. 604, 616 (1996) ("Unregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute."), Despite the references in the case law and the statute to the term "soft money," for the sake of clarity in an area of law that demands absolute precision, the Court generally eschews the phraseology "hard money" or "soft money" in favor of "federal funds" or "nonfederal funds." Federal funds are those monies regulated under FECA, as amended, and nonfederal funds are those monies that may or may not be regulated under state law, but not federal law.

[10] In 1979 Congress again amended FECA to exempt two new sets of activities from the definition of contribution and expenditure. First, state and local party disbursements for campaign materials such as pins, bumper stickers, and yard signs used in connection with volunteer activities on behalf of the party's nominees were exempted from FECA's contribution limits provided that the activity was paid for with federal money. 2 U.S.C. § § 431(8)(B)(ix), 9(B)(viii). The second exemption

Essentially, the FEC's opinions and rulemakings permitted state and national party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if those state laws were in direct contravention of FECA, such as permitting contributions from corporate and labor union general treasury funds. As a result, national and state parties began to raise so-called "soft money," which described these nonfederal funds, not subject to FECA limits and restrictions, that were used to pay for these administrative and generic voter drive expenses.

With these developments, nonfederal funds became an increasingly important means of party financing. During the 1980 election, the RNC spent approximately $15 million in nonfederal funds and the DNC spent roughly $4 million, constituting 9% of the national parties total spending. Mann Expert Rep. at 12.[11] In 1984, the national parties spent collectively an estimated $21.6 million in nonfederal money, which accounted for 5% of their total spending. *Id.* By 1988,

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related to a state party's payment for "the costs of voter registration and [GOTV] activities" conducted on behalf of the party's presidential ticket. 2 U.S.C. § § 431(8)(B)(xi), (9)(B)(ix). This exemption was also conditioned on the use of federal money for the activity. Hence, for both of these activities unlimited federal money could be used to pay for them because they were exempted from the definition of "contribution" and "expenditure." For state and local parties that opted to use nonfederal funds to pay for these activities, allocation was still permitted.

[11] As Defense Expert Mann plainly concedes, "Just what amount of soft money activity the parties pursued in the 1980s is less certain [because] '[n]onfederal' funds were not subject to federal disclosure requirements, only to the disclosure laws in states where soft money was spent." Mann Expert Report at 12. It was not until 1992 that the FEC began collecting official data on national parties use of nonfederal funds, so any attempts at pinpointing the amount of nonfederal funds spent by the national parties before 1992 are estimates. Notably, Plaintiffs do not challenge any of the pre-1992 estimates (or any of the post-1992 data collected by the Commission). Therefore, the Court relies on these statistics.



national party nonfederal money had increased to an approximate $45 million, or 11% of national party spending. *Id.*

In 1990, the FEC promulgated regulations to provide for some consistency in the methods used to determine the relative portions of federal and nonfederal money to be used in financing these generic party activities. Prior to 1990, the regulations specified that the allocation rate between nonfederal and federal accounts was to be done on a "reasonable basis." 11 C.F.R. § 106.1(e) (1977). The regulations promulgated by the Commission were designed to give certainty to this subjective standard and were in response to a district court's decision which held that the allocation rules required specific guidance from the Commission. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987) ("Indeed, it is possible that the Commission may conclude that no method of allocation will effectuate the Congressional goal that all monies spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA. That is an issue for the Commission to resolve on remand.").[12] Under the new regulations, national party committees (other than Senate and House national party committees) were required to allocate at least 65% of their administrative and generic voter drive expenses [13] to their federal accounts in presidential election years

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[12] The Court observes that *Common Cause v. FEC* demonstrates that as early as 1984, before any official statistics on nonfederal funds were kept by the Commission, there was concern over the influence of these monies on federal elections. However, the Commission in 1984 determined that, "Common Cause has not presented evidence of instances in which 'soft money' has been used to influence federal elections sufficient to justify the stringent rules proposed in its petition." *Common Cause*, 692 F. Supp. at 1393 (citing the Commission's April 17, 1986, Notice of Disposition).

[13] The Commission permitted, *inter alia*, the following expenses to be allocated: administrative expenses, which included rent, utilities, office supplies, and salaries, 11 C.F.R. § 106.5(a)(2)(i) (1991); the direct costs of

and 60% in non-presidential election years. 11 C.F.R. § § 106.5(b)(2)(i), (ii)(1991). Senate and House committees were to allocate these expenses on the basis of the ratio of federal expenditures to total federal and nonfederal disbursements made by the committee during the two-year federal election cycle. 11 C.F.R. § 106.5(c)(i). For state and local parties, the allocation between the federal and nonfederal accounts for these expenses were determined by the proportion of federal offices to all offices on a state's general election ballot. 11 C.F.R. § 106.5(d) (1991). Generally, the state parties' allocation rate was substantially lower than the national party allocation rate. Mann Expert Rep. at 14. The new rules also mandated that the national party committees disclose the details of their nonfederal accounts. 11 C.F.R. § § 104.8(e), (f) (1991) (requiring national parties to report for nonfederal and building fund accounts the donating individual's name, mailing address, occupation or type of business, and the date of receipt and amount of any such donation). State parties, however, were exempted from these disclosure requirements. 11 C.F.R. § 104.9(a) (1991) (reporting committees required to disclose information pertaining to "the committee's federal account(s) only"). The Commission's regulations, therefore, provided the national parties with an incentive to channel these expenditures through state party committees, since this approach generally permitted more nonfederal dollars to be spent than if a national party spent the money without disclosing the sources of the funds.

In 1992, spending on nonfederal money by the national parties reached $80 million, or 16% of the national parties

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a fundraising program or event, where federal and nonfederal funds are collected by one committee, 11 C.F.R. § 106.5(a)(2)(ii) (1991); and "generic voter drives," which included voter identification, voter registration, and get-out-the-vote ("GOTV") drives where a specific candidate was not mentioned. 11 C.F.R. § 106.5(a)(2)(iv) (1991).



total spending. Mann Expert Rep. at 15 (citing to official figures from the FEC). Of that total amount, the national parties contributed only $2 million directly to state and local candidates. Mann Expert Rep. at 16. In addition, the two national parties transferred over $15 million to state party committees-two thirds of which was transferred to presidential election battleground states. *Id.* Along these lines, the national parties expended $14 million in nonfederal funds for "generic" party advertising, consisting predominantly of television advertisements that did not mention candidates names, but urged viewers to simply vote for a particular party or stressed themes from the presidential campaigns. *Id.* Although the Commission had only approved the use of nonfederal funds by the national parties "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office," by 1992, with the new allocation rules firmly in place, national parties were using nonfederal money to impact federal elections as permitted by the Commission. FEC Advisory Op. 1979-17.

With the 1996 election cycle, the national parties' total nonfederal funds spending reached $272 million, which was 30% of the national party committees' total spending. Mann Expert Rep. at 21. Starting in the Fall of 1995 and continuing through 1996, Democratic party committees used soft money to fund advertisements that either promoted President William J. Clinton by name or criticized his opponent by name, while avoiding words that expressly advocated either candidate's election or defeat.[14] *Id.* at 18. In May of 1996, the

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[14] The argument that such advertisements could be paid for with nonfederal funds had its origins in *Buckley*. The Supreme Court in *Buckley*, in an attempt to save from unconstitutional vagueness the independent expenditure prohibitions, narrowed them to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. In a footnote, the *Buckley* Court found that "[t]his [narrowing] construction would restrict the application of § 608(e)(1) to

Republican National Committee announced its plans to spend $20 million onan "issue advocacy" campaign. *Id.* at 20.

Although many of the advertisements featured the presidential candidates, none of the costs of these advertisements were charged as coordinated expenditures on behalf of the candidate's campaign, which would have subjected the expenditure to FECA's contribution limits. Instead, the parties paid the full cost, with a mix of federal and nonfederal funds as permitted by FEC allocation rules.[15] Often the advertisements were paid for by state party committees, where the allocation rules permitted greater spending of soft money. Mann Expert Report at 22 (noting over $115 million was transferred from the national parties to the state party committees). In fact, state party nonfederal funds for political communication/advertising went from $2 million in 1992 to

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communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Even though the Supreme Court narrowed the provision of the law, it struck down the expenditure provision as unconstitutional as written and as narrowed by the Court. *Id.* at 44.

It was based on this language that the national parties in 1995 and 1996 argued that as long as they ran advertisements that did not mention "express words of advocacy of election or defeat," they could use nonfederal money to run advertisements that supported their presidential candidate or attacked his opponent.

[15] The FEC had previously ruled that party committees could sponsor issue advocacy advertisements that did not feature a federal candidate and pay for these advertisements with a combination of federal and nonfederal dollars as permitted under the allocation regulations. FEC Advisory Op. 1995-25 (discussing that allocation rules were permissible to allocate funding for "RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform"). The national parties used this advisory opinion as justification for their issue advocacy campaigns featuring candidates for federal office and paid for with nonfederal money.



$65 million in 1996. *Id.* at 22; *see also* La Raja Expert Report at 18. A similar strategy was also used by the parties to support their candidates for congressional office. Mann Expert Report at 20. Following the 1996 election, the FEC began a series of investigations over the parties' 1996 election practices. Statement of Reasons of Commissioner Scott E. Thomas for MURs 4553 and 4671, 4713, 4407 and 4544 at 2-5 [DEV 51]. In 2000, the FEC deadlocked over whether there was reason to believe that the national parties advertising program constituted an excessive in-kind contribution to the presidential campaigns. *Id.* at 5.

The Senate and House also conducted extensive investigations into the 1996 federal elections. Both the majority and minority reports in the Senate investigation concluded that permitting nonfederal donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections. Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (6 vols.), Mar. 10, 1998, ("Thompson Committee Report"); *id.* at 4468 (majority report) ("[S]oft money spending by political party committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates."); *id.* at 4572 (minority report) ("The soft money loophole undermines the campaign finance laws by enabling wealthy private interests to channel enormous amounts of money into political campaigns."). In the House, the Committee on Government Reform and Oversight conducted a wide ranging investigation, which culminated in public hearings during 1997, into, *inter alia,* campaign fundraising by political parties from foreign sources. *See* Campaign Finance Investigation: Hearings Before the House Committee on Government Reform and Oversight, 105th Cong. 6 (October 8, 1997) (statement of Chairman Dan Burton) ("This

Committee's hearings will cover many subjects . . . . Our initial focus has been how political parties took or raised contributions from foreign sources. I am gravely concerned about foreign governments, foreign companies or foreign nationals trying to influence our electoral processes."); Conduit Payments to the Democratic National Committee: Hearings Before the House Committee on Government Reform and Oversight, 105th Cong. 6 (October 9, 1997) (statement of Chairman Dan Burton) ("Today, marks the first day of hearings into illegal foreign fundraising and other violations of law during recent campaigns.").

Nevertheless, without any congressional action, nonfederal funds emerged as a significant source of party resources. With these strategies firmly in place, the national parties spent $221 million of nonfederal money on the 1998 midterm elections, or 34% of their total spending, which was more than double the amount of nonfederal funds spent during the previous midterm election. Mann Expert Report at 23. With the 2000 elections, the national parties spent $498 million worth of nonfederal funds,which was 42% of their total spending. *Id.* at 24.

The use of nonfederal funds by the political parties was paralleled to some degree by a similar development in the rise of issue advocacy by corporations and labor unions. Aside from the political parties making advertisements that supported their candidates or attacked the opponent without using words of direct "express advocacy," unions and corporations began to mount "issue advocacy" campaigns, particularly beginning with the 1996 election, that were paid directly from their general treasuries. For example, in 1996 the AFL-CIO ran the following advertisement from September 26 to October 9 in the district of House Republican incumbent Steve Stockman:

> [Narrator] What's important to America's families? [Middle-aged man] "My pension is very important



> because it will provide a significant amount of my income when I retire." [Narrator] *And where do the candidates stand?* Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

AFL-CIO 000593; [DEV 124] (emphasis added); *see also* AFL-CIO 000602.

Advertisements such as the above illustration were permitted by the Supreme Court's ruling in *FEC v. Massachusetts Citizens for Life, Inc.* In that case, the Supreme Court found that the prohibition on corporate and union treasury spending on expenditures found in 2 U.S.C. § 441(b) needed to be narrowly construed to only apply to express advocacy. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). As a result, corporations and labor unions were free to use general treasury funds to finance issue advocacy campaigns. It does not appear that prior to 1996, the practice of using issue advertising to influence federal elections was a widespread practice.

In addition, the issue advocacy campaigns by corporations and labor unions were free from the disclosure provisions upheld in *Buckley* because they were considered outside of FECA's regulatory purview. This lack of disclosure permitted various interest groups to conceal the true identity of the source behind the advertisement. Thus, following both the 1996 and 2000 elections, corporations and unions used their general treasury funds to run advertisements apparently aimed at influencing federal elections and avoiding FECA's longstanding disclosure provisions.

With regard to both political party spending of nonfederal funds and political party, corporate, and labor union issue advocacy, there does not appear to be any dispute among the litigants to the fact that much of this behavior was not regulated or was permitted by the FEC. Rather, the dispute between the parties centers around the effect of engaging in these tactics, whether the measures needed addressing, and how Congress ultimately remedied what it perceived to be a problem. It is the congressional response to which the Court now turns.

B. *The Bipartisan Campaign Reform Act of 2002*

In response to what it perceived were burgeoning problems with federal campaign finance laws, Congress began to consider reform legislation over six years ago, during the 105th Congress.[16] The overhaul of our Nation's existing campaign finance laws—culminating with the enactment of BCRA—would consume the attention of three separate Congresses[17] and require navigation through atypical parliamentary procedures.

During the 105th Congress, the House of Representatives considered House Bill 2183, the Bipartisan Campaign Integrity Act of 1997, offered by Representative Asa Hutchinson. The bill was first considered on May 22, 1998.[18] 144 Cong.

[16] *See* Bipartisan Campaign Finance Reform Act of 1998, H.R. 2183, 105th Cong. (1998), *available at* http://thomas.loc.gov.

[17] *See id.;* Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th (1999); Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 116 Stat. 81 (2002).

[18] According to *Congressional Quarterly* reporter David Mark, the House Leadership only allowed floor consideration of House Bill 2183 after it appeared that supporters of the bill had nearly secured the requisite 218 signatures on a discharge petition to automatically bring the bill to the floor, which did not require the consent of the leadership. *See* David Mark, *Campaign Finance Discharge Petition Off to Fast Start*, Congressional Quarterly Daily Monitor (July 31, 2001).



Rec. H3774 (daily ed. May 22, 1998). On August 3, 1998, during consideration of Representative Hutchinson's bill on the House floor, the Committee of the Whole[19] adopted an amendment in the nature of a substitute offered by Representatives Christopher Shays and Martin Meehan.[20] 144 Cong. Rec. H6947 (daily ed. Aug. 3, 1998). Finally, on August 6, 1998, the House passed House Bill 2183, as amended (the Bipartisan Campaign Reform Act of 1998), by a vote of 252-179. 144 Cong. Rec. H7330 (daily ed. Aug. 6, 1998). The bill was referred to the Senate on September 9, 1998, 144 Cong. Rec. S10, 114 (daily ed. Sept. 9, 1998), but was not considered prior to adjournment, *sine die*, on October 21, 1998. As a result, the Bipartisan Campaign Reform Act of 1998 died in the Senate during the 105th Congress.

[19] When considering most major legislation, the House of Representatives typically adopts a rule, in the form of a House Resolution, that governs, and generally limits, debate on the underlining bill. In order to expedite consideration of the underlining bill, the rule suspends the proceedings of the House of Representatives, and the body operates as one large committee, the Committee of the Whole House on the State of the Union ("Committee of the Whole"). Walter J. Oleszek, *Congressional Procedures and the Policy Process* 151-53 (5th ed., CQ Press 2001). This parliamentary mechanism enables the House to act with a quorum less than the requisite 218 members; only 100 members are needed to constitute a quorum in the Committee of the Whole. *Id.* at 152. (There are numerous other technical distinctions between the Committee of the Whole and the House of Representatives that enable expeditious consideration of legislation). *Id.* at 152-53. After the Committee of the Whole considers the underlining legislation, generally, the rule governing debate automatically dissolves the Committee of the Whole, and the House of Representatives reconvenes to vote on the underlining bill for final passage.

[20] Beyond making numerous substantive changes to the underling bill, the Shays-Meehan substitute amendment changed the title of the bill from the "Bipartisan Campaign Integrity Act of 1997," 144 Cong. Rec. H3774 (daily ed. May 22, 1998), to the "Bipartisan Campaign Reform Act of 1998," 144 Cong. Rec. H4790-96 (daily ed. June 18, 1998).

On January 19, 1999, during the 106th Congress, Representative Shays introduced House Bill 417, the Bipartisan Campaign Reform Act of 1999, which attracted the support of 96 original cosponsors. *See* H.R. 417, 106th Cong. (1999). Upon introduction, the bill was referred to the Committee on House Administration, where it received an unfavorable report. H.R. Rept. 106-297, pt. 1, at 17 (1999). Nonetheless, the proponents of campaign finance reform secured floor consideration through the threat of a discharge petition. *See* David Mark, *Campaign Finance Discharge Petition Off to Fast Start,* Congressional Quarterly Daily Monitor (July 31, 2001). When the Bipartisan Campaign Reform Act of 1999 reached the floor for a vote, it passed comfortably, by a vote of 252-177. 145 Cong. Rec. H8286 (daily ed. Sept. 14, 1999). On September 16, 1999, the Senate received House Bill 417, and on September 29, the Senate referred it to the Senate Committee on Rules and Administration, 145 Cong. Rec. S11,638 (daily ed. Sept. 29, 1999), where it would remain for the balance of the 106th Congress. The Senate responded to the House's action by considering Senate Bill 1593, also titled the Bipartisan Campaign Reform Act of 1999, which was introduced on September 16, 1999, by Senators McCain and Feingold, shortly after House Bill 417 secured passage. S. 1593; *see also* 145 Cong. Rec. H8286 (daily ed. Sept. 14, 1999). The Senate, however, failed to invoke cloture,[21] thereby failing to

[21] While debate on the Senate floor does not always lead to an all-out filibuster, on controversial legislation, the Senate typically invokes cloture to end the threat of unlimited debate or simply to gauge support for the underlining bill. *See* Walter J. Oleszek, *Congressional Procedures and the Policy Process* 231-34 (5th ed., CQ Press 2001). Under Rule XXII of the Standing Rules of the Senate, if "three-fifths of the Senators duly chosen and sworn" (60 Senators if the Senate is at its full membership) vote in the affirmative on a motion for cloture, further debate on the question shall be limited to no more than one hour for each Senator, and the time for consideration of the matter shall be limited to 30 additional hours, unless



limit debate on two separate amendments to Senate Bill 1593, and the bill floundered. 145 Cong. Rec. S12,800 (daily ed. Oct. 19, 1999); *id.* at S12,803. As a result, for the second time in as many years, the campaign finance reform bill died in the Senate.

Circumstances changed during the 107th Congress; this time it was the Senate that acted first and passed campaign finance reform legislation, Senate Bill 27,[22] by a vote of 59-41. 147 Cong. Rec. S3258 (daily ed. Apr. 2, 2001). The bill was then transferred to the House of Representatives.

Representatives Shays and Meehan had already introduced House Bill 380, the Bipartisan Campaign Reform Act of 2001, when the Senate secured passage of Senate Bill 27. *See* H.R. 380, 106th Cong. (1999). On June 28, 2001, in an effort to make their legislation conform with the Senate-passed bill,[23] Representatives Shays and Meehan introduced new legislation, House Bill 2356, also titled the Bipartisan Campaign Reform Act of 2001. The House Leadership, which, through the Speaker of the House, controls access to

increased by another three-fifths vote. *See* Standing Rules of the Senate, Rule XXII, *available at* http:// rules.senate.gov/senaterules/rule22.htm.

[22] Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

[23] Faced with the fact that Senate Bill 27 was unlikely to garner the support of a majority of the House, and given the fact that House Bill 380 differed from Senate Bill 27, Representatives Shays and Meehan met with members of the Senate to work out a compromise bill. The agreement they reached was reflected in House Bill 2356. *See* David Mark & John Cochran, *House Panel to Mark Up Dueling Campaign Finance Bills,* Congressional Quarterly Daily Monitor (June 27, 2001) ("The revisions are designed to encourage the Democratic-controlled Senate to accept a House-passed bill, thus avoiding the need for a conference committee. 'We're trying to pre- conference with supporters of the bill, rather than going to conference with opponents,' Shays said.").

the House floor,[24] agreed to consider House Bill 2356. However, in a last minute effort to tweak the legislation, Representatives Shays and Meehan proposed several amendments. John Cochran, *Not Victory but Vitriol for Campaign Finance Bill*, Congressional Quarterly Weekly (July 13, 2001). The package of amendments offered by Shays and Meehan reflected the need for additional changes to ensure that House Bill2356, if passed by the House, would be considered without amendment by the Senate, thereby eliminating the need for a conference committee.[25] *See id.* In addition, Shays and Meehan requested that the Rules Committee write a rule for consideration and debate on the House floor that would treat this package as a single amendment, which could be considered in one vote. *Id.* The Rules Committee refused, drafting a resolution for consideration and debate that would treat each change,

[24] The Speaker of the House picks the 9 majority-party members that serve on the powerful House Committee on Rules—the gateway to the House floor. The Rules Committee writes the rules that govern debate and determines which amendments will be considered. The committee currently consists of 13 members, 9 majority-party members chosen by the Speaker of the House and 4 minority-party members chosen by the House Minority Leader. *See* Walter J. Olsezek, *Congressional Procedures and the Policy Process* 119 (5th ed., CQ Press 2001).

[25] Members of a conference committee are formally appointed by the Speaker of House and the presiding officer of the Senate. Walter J. Oleszek, *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001). In the House, after initial appointment, the Speaker retains the authority to add and remove members. *Id.* at 254. Although the House rules provide that the Speaker shall "appoint no less than a majority [of conferees] who generally supported the House position [on the legislation] as determined by the Speaker," Rules of the House of Representatives, 108th Cong. (2003) *available at* http://www.house.gov/rules/house_rules.htm, in practice, the Speaker is vested with significant discretion to ensure that the House delegates are amicable to the leadership's position. *See* Walter J. Oleszek, *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001).



fourteen in total, as separate amendments. *Id.; see also* H.R. Res. 188, 107th Cong. (2001). Shays, Meehan, and their supporters opposed the rule, claiming that the House Leadership used "technicalities" to defeat the bill, and called upon their colleagues to reject the rule. 147 Cong. Rec. H3984 (daily ed. July 12, 2001) (statement of Rep. Meehan). The House voted and the rule failed.[26] In the aftermath, however, the bill's proponents and the House Leadership were unable to come to an agreement over a compromise rule for the consideration and debate of House Bill 2356, John Cochran, *Not Victory but Vitriol for Campaign Finance Bill*, Congressional Quarterly Weekly (July 13, 2001), and the bill was pulled from the House Floor.

On July 30, 2001, Representative Jim Turner filed a discharge petition to bring House Bill 2356 to the floor for consideration. H.R. Discharge Pet. No. 3, *available at* http://clerkweb.house.gov/107/lrc/pd/Petitions/Dis3.htm. As congressional procedure scholar Walter J. Oleszek noted:

> [t]he discharge procedure, adopted in 1910, provides that if a bill has been before a standing committee for thirty legislative . . . days, any member can introduce a motion to relieve the panel of the measure . . . . If the requisite number of members (218) sign the petition, this procedure permits a majority of the House to bring a bill to the floor even if it is opposed by the committee that has jurisdiction over the measure, the majority leadership, and the Rules Committee.

Walter J. Oleszek, *Congressional Procedures and the Policy Process* 138 (5th ed., CQ Press 2001). While the discharge petition permits a majority of the House to circumvent a stacked committee or the House Leadership, it

[26] This marked the first occasion in which Speaker J. Dennis Hastert lost a vote on a rule during his first two years as Speaker of the House. Karen Foerstel, *A Bitter Day for the GOP*, Congressional Quarterly Weekly (July 13, 2001).

has not been a highly effective tool for passing legislation, let alone securing its enactment into law. As Walter Oleszek went on to observe:

> Few measures are discharged from committee. From 1931 through 1994 (approximately the period during which the modern version of the rule has been in effect), more than five hundred discharge petitions were filed, but only forty-six attracted the required signatures and only nineteen bills were discharged and passed by the House. Of those, only two became law: the Fair Labor Standards Act of 1938 and the Federal Pay Raise Act of 1960.

*Id.* at 139. Despite this history of failure, on January 24, 2002, Representative Turner's petition attracted 218 signatures, the requisite number to achieve discharge. *See* H.R. Discharge Pet. No. 3. Consequently, the bill was sent to the floor and scheduled for debate. *See* H.R. Res. 203, 107th Cong. (2001); H.R. Res. 344, 107th Cong. (2002); 148 Cong. Rec. H266 (daily ed. Feb. 12, 2002). On February 13, 2002, the House began to consider House Bill 2356. During consideration, the House rejected three substitute amendments—one offered by House Majority Leader Dick Armey[27] and two offered by House Administration Committee Chairman Robert Ney[28]—before agreeing to Representative Shays' substitute amendment by a vote of 240-191, 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002). Like the earlier amendment package, the Shays Substitute was designed to avoid a conference committee, where opponents would have

[27] The Armey Substitute, Amendment 415, failed by a vote of 179-249. 148 Cong. Rec. H376-77 (daily ed. Feb. 13, 2002).

[28] The first Ney Substitute, Amendment 416, failed by a vote of 53-377. 148 Cong. Rec. H392 (daily ed. Feb. 13, 2002). The second Ney Substitute, Amendment 430, failed by a vote of 181-248. *Id.* at H464-65.



another opportunity to scuttle the bill,[29] by making changes likely to garner the support of a majority of the Senate without forcing them to alter the text of the House-passed bill. *See* 148 Congr. Rec. H402 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (observing that the Shays substitute amendment was drafted after having "met with Senators from both sides of the aisle to learn what was needed in that bill in order to pass [BCRA]").[30] After considering a series of amendments to the newly amended, underlining bill (House Bill 2356), the House passed BCRA by a vote of 240-189. 148 Cong. Rec. H465-66 (daily ed. Feb. 13, 2002). On March 20, 2002, the Senate followed suit, passing BCRA by a vote of 60-40. 148 Cong. Rec. S2160-61 (daily ed. Mar. 20, 2002).

On March 27, 2002, President George W. Bush signed BCRA into law; the first major overhaul of the Federal Election Campaign Act since the 1974 Amendments and their revision following *Buckley*. Broadly speaking, Title I attempts to regulate political party use of nonfederal funds, while Title II seeks to prohibit labor union and corporate treasury funds from being used to run issue advertisements that have an ostensible federal electioneering purpose.

C. *Procedural History of the Litigation of this Case*

On the morning of March 27, 2002, President Bush signed BCRA into law. Within hours, Senator McConnell and the

[29] The process of going to conference creates three additional hurdles to the enactment of legislation. First, the conferees must come to an agreement, and in addition, the Conference Report must pass both the House and the Senate. Moreover, the House and Senate Leadership appoint members to the conference committee and enjoy considerable discretion over its composition. *See* Walter J. Oleszek *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001); *see also supra* note 25.

[30] The Shays Substitute, Amendment 417, also amended the title of the bill to its present form: the "Bipartisan Campaign Reform Act (BCRA) of 2002." 148 Cong. Rec. H393 (daily ed. Feb. 13, 2002).

National Rifle Association ("NRA") filed complaints challenging the constitutionality of various provisions in BCRA. On April 16, 2003, pursuant to Congress's directive, BCRA § 403(a)(1),[31] those cases were assigned to a district court of three judges consisting of District Court Judge Colleen Kollar-Kotelly, District Court Judge Richard J. Leon, and Circuit Court Judge Karen LeCraft Henderson. A week later, on April 23, 2002, the three-judge court held a status conference, in which it heard the parties' proposals on consolidation, intervention, discovery, and the filing of motions.

The primary issue confronting the Court at the status conference was the scope of discovery required to develop a satisfactory factual record. The defendants, in their pleading, argued that "wide-raging discovery" was necessary "even in the context of a facial challenge, . . . [in order to] look to the record of the case for evidence substantiating the governmental interests asserted in support of legislation said to violate the First Amendment." Def.'s Report in Response to the Court's Order of April 16, 2002, at 9 (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664-68 (1994); *Colorado Republican Fed. Campaign Comm. v. FEC ("Colorado I")*, 518 U.S. 604, 618-19 (1996) (plurality opinion)).[32] Mindful that the Supreme Court remanded a First

[31] BCRA § 403(a)(1) states: "The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code."

[32] The plaintiffs did not disagree that some discovery was necessary:

> JUDGE KOLLAR-KOTELLY: So, as I understand it, then, everybody wants to do depositions, everybody wants to do some exchange of expert reports, and everybody wants to have some sort of lay statement, affidavits or statements. Is that accurate? . . . If somebody disagrees with that, let me know.
>
> MR. ABRAMS: That's entirely accurate from our point of view, Your Honor.



Amendment case to a three-judge district court in *Turner Broadcasting* to "permit the parties to develop a more thorough factual record," 512 U.S. at 668,[33] this Court agreed with the defendants that extensive discovery was necessary[34] to review the evidentiary grounds for BCRA, and in part, to avoid the "disaster" of remand. Status Conference Tr., April 23, 2002, at 51 (statement of James Gilligan).[35] Notwith-

Status Conference Tr., April 23, 2002, at 13; see also Status Report and Proposed Schedule of Plaintiffs Senator Mitch McConnell et al., April 22, 2002 (stating that their proposed schedule "is designed to ensure that a full record is compiled for submission to this Court, and ultimately to the United States Supreme Court").

[33] At issue in *Turner* was a constitutional challenge to the "must-carry" provisions that required carriage of local broadcast stations on cable systems. The Supreme Court remanded the case to the three-judge district court, explaining that in order to assure that Congress drew "reasonable inferences based on substantial evidence" that a harm truly existed, the Court needed "substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, *or the introduction of some additional evidence*." *Id.* at 667 (emphasis added). Because of the "paucity of evidence" and "lacking" of findings on the effect of the regulations, the Court could also not undertake the narrow tailoring step: "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech . . . than necessary' to ensure the viability of broadcast television." *Id.* at 667-68. What followed was "another 18 months of factual development on remand" to the three-judge panel, *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 187 (1997) (citation and internal quotations omitted), and, here, the defendants in this case warned that "[t]he factual inquiry . . . could be on a scale similar to that of *Turner*," Status Conference Tr., April 23, 2002, at 48 (statement of James Gilligan).

[34] This Court recognizes that "we've got to have an adequate factual record." Status Conference Tr., April 23, 2002, at 10 (statement of Judge Henderson).

[35] In *Colorado I*, the Supreme Court remanded the issue of whether coordinated party expenditures are constitutional, *Colorado I*, 518 U.S. at 623-26; *see also* 2 U.S.C. § 441a(d)(3), and the Tenth Circuit subsequently passed the case on to the district court, stating that

standing Congress's directive "to expedite to the greatest possible extent the disposition of the action and appeal," BCRA § 403(a)(4), it was also clear from the legislative record that Congress did not want this Court to "compromise informed and deliberate judicial decision-making in the process." *See* Def.'s Report in Response to the Court's Order of April 16, 2002, at 8. Indeed, Senator Feingold, one of the principal Senate sponsors, explained during the Senate debate:

> Finally, and most importantly, although [Section 403(a)(4)] provides for the expedition of these cases to the greatest possible extent, we do not intend to suggest that the courts should not take the time necessary to develop the factual record . . . This case will be one of the most important that the Court has heard in decades, with ramifications for the future of our political system for years to come. By expediting the case, we in no way want to rush the Court into making its decision without the benefit of a full and adequate record.

147 Cong. Rec. S3189 (March 30, 2001) (statement of Sen. Feingold); *see also id.* at S3189-90 (statement of Sen. Dodd) (supporting the expedition provision, but stating "I do not

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> [T]he issues are too important to be resolved in haste. It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues' resolution.

*FEC v. Colorado Republican Fed. Campaign Comm.*, 96 F.3d 471, 473 (1996). The district court then allowed the parties to conduct discovery for eleven and a half months, significantly longer than our total discovery schedule for many issues of similar complexity. Status Conference Tr., April 23, 2002, at 63 (statement of James Gilligan); *cf. FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d 1197 (D.Co. 1999); *see also* 213 F.3d 1221, 1225 (10th Cir. 2000) (stating that the parties "compiled an extensive record").



want to suggest that the Court should not take adequate time to review any such challenge").[36]

Accordingly, the next day, the Court issued a unanimous order outlining a discovery and briefing schedule, which allowed for over five months of discovery and almost an additional month for cross-examination of fact and expert witnesses; set May 7, 2002, as a deadline by which all other actions would be filed; and decided that briefing was to take place between November 4 and November 25, 2002. In a highly unusual accommodation to Congress's request for expedition, the Court set oral arguments to begin on December 4, 2002, just over a week after the parties submitted their final briefs. *See* Scheduling Order of April 24, 2002. By May 10, 2002, 101 parties were involved in the consolidated action, with the eighty-four plaintiffs challenging twenty-three provisions of BCRA.[37] After the

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[36] Judge Henderson maintains that the *Buckley* case was handled with much greater efficiency than the three-judge panel here. Henderson Op. at 6 n.1. In *Buckley v. Valeo*, the lawsuit was filed on January 2, 1975, but a decision was not issued by the D.C. Circuit until seven and a half months later on August 15, 1975. *Buckley*, 519 F.2d at 821, 901. While this case required thirteen months from filing to disposition, the parties also undertook six months of discovery-at least four months of discovery and fact-finding more than that undertaken in *Buckley*. *Id.* at 902-03. That four months of discovery alone accounts for most of the discrepancy in the two expedited, yet complicated, campaign finance cases. Moreover, given the vast record developed through the six months of discovery in this case, it is not surprising that this Court required a few more months than the *Buckley* court to arrive at a decision after the arguments-for only careful consideration of the record before us could reduce the risk of committing clear error in our findings. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[37] On May 10, 2002, the Court consolidated all cases that were not consolidated on April 24, 2002, *see* Order, May 10, 2002; Order Consolidating Cases, April 24, 2002, and also permitted Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator

Court dismissed seven plaintiffs from the suit without prejudice, *see infra* note 55, seventy-seven plaintiffs and seventeen defendants remained. *See id.* (listing all plaintiffs and defendants).

During the discovery process, the parties filed a total of twenty-three motions with the Court, including motions to compel responses to document requests, motions to compel responses to interrogatories, and motions for protective orders. At a hearing on July 25, 2002, the Court heard arguments as to many of the discovery disputes. Thereafter, the Court resolved the disputes with memorandum opinions. *See, e.g.*, Order Denying Federal Election Commission's Motion for Entry of Protective Orders, August 12, 2002; Order Denying in Part and Granting in Part Plaintiffs' Motions to Compel Interrogatory Responses, August 15, 2002; Order Denying Adams Plaintiffs' Motion to Compel Intervenors to Respond to Interrogatories and Produce Documents, September 10, 2002.

On October 7, 2002, the Court ordered the parties to meet and confer and to deliver a proposed format on the briefing and proposed findings of fact. *See* Order, October 7, 2002. In their joint response, the plaintiffs (absent the Adams and Thompson plaintiffs) requested 751 pages, the Adams Plaintiffs requested 115 pages, and the defendants requested 750 pages. *See* Joint Submission in Response to the Court's Order of October 7, 2002. The Court ordered that the plaintiffs, including the Adams and Paul plaintiffs, submit three rounds of briefs not to exceed 840 pages and that the defendants' briefs submit three rounds of briefs (*i.e.*, opening, opposition, and reply) not to exceed 820 pages.[38] The Court

James Jeffords to intervene as defendants supporting the constitutionality of BCRA, *see* Order, May 10, 2002.

[38] Each side was originally given an aggregate of 820 pages, however, the Court, in an Order dated October 29, 2002, granted the Adams and Thompson Plaintiffs the ability to file their own independent briefing which increased the aggregate page amount for Plaintiffs.



also directed the plaintiffs collectively, and the defendants collectively, to each submit proposed findings of fact of no more than 300 pages. Briefing Order, October 15, 2002; Order, October 19, 2002.

On November 25, 2002, a little over a week before oral arguments were scheduled to begin, the parties filed their last round of briefs, bringing the total briefing to 1,676 pages (not including *amicus curiae* briefs). A day later, the parties submitted 576 pages of proposed findings of fact. The evidentiary submissions themselves included forty-one boxes (plus thirteen additional binders), which, by a conservative estimation, comprised the testimony and declarations of over 200 fact and expert witnesses and over 100,000 pages[39] of material.[40] With the record and pleadings before it, the Court commenced oral arguments on December 4, 2002. The Court heard six hours of arguments that day, and three hours of oral

[39] *See* Joint Submission in Response to the Court's Order of October 7, 2002.

[40] The record in this case was described by one advocate during the oral argument as "elephantine." Oral Argument Tr. at 152 (statement of Floyd Abrams); *see also id.* at 279-80. We agree. Both sides should be commended for their extraordinary efforts in gathering and organizing the evidence in such a short period of time. We agree with Seth Waxman, attorney for the Intervenor-Defendants, who urged us to carefully review the record before us:

> I think it's very, very important for the court to look carefully at the record . . . . We have worked, all of us on both sides of this case have worked harder than I ever believed I could be made to work in order to give you this record . . . . I think the ads itself and the reports and affidavits that have been submitted I think are very, very important. I know everybody feels that way.

*Id.* at 279-80 (statement of Seth Waxman).

arguments the following day, from a total of twenty-four attorneys.[41]

D. *Description of the Specific Provisions in BCRA At Issue in These Lawsuits*

The Court briefly next sets forth the provision of the law that are at issue in the litigation.

1. Title I: Reduction of Special Interest Influence

a. *The National Party Soft Money Ban: Section 323(a)*

The first provision of Title I involves the addition of a new section to FECA, section 323, entitled "Soft Money Of Political Parties." Section 323(a) states that national party committees (including national congressional campaign committees) "may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." BCRA § 101(a); FECA § 323(a)(1); 2 U.S.C. § 441i(a)(1). The law applies to "any . . . national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." BCRA § 101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2). The clear import of this provision is

[41] We disagree with Judge Henderson's statement that "there was a consensus [at the hearing] that the [Supreme] Court had to receive the case no later than early February." Henderson Op. at 6 n.1. A fair reading of former Solicitor General Waxman's colloquy with Judge Henderson, prompted by her questions, in our judgment, would be that the Supreme Court has the ability to adjust the briefing and oral argument schedule, and has done so in the past, to hear cases exactly such as this one. In short, neither former Solicitor General stated his conclusion in categorical terms, and neither provided an estimate of how long after a hearing the Supreme Court would need to issue its opinion. *See generally* Tr. at 18-20; 277-280.



that national party committees are banned from any involvement with nonfederal money.

b. *The State and Local Party Soft Money Ban: Section 323(b)*

In summary terms, Section 323(b) provides, that subject to certain exceptions, a State, district, or local committee of a political party may not use nonfederal funds to pay for "Federal election activity." BCRA § 101(a); FECA § 323(b); 2 U.S.C. § 441i(b).

In general, section 323(b)(1) prohibits state and local political parties from spending any money not raised in accordance with FECA on "Federal election activity." BCRA § 101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). Federal election activity is defined by the Act as:

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). Federal election activity does not include:

> (i) public communication that refers solely to a clearly identified state or local candidate (unless the communication otherwise qualifies as Federal election activity, for instance, as GOTV); (ii) a contribution to a state or local candidate (unless designated to pay for some other kind of Federal election activity); (iii) a state or local political convention; or (iv) grassroots campaign materials (stickers, buttons, etc.) that name only a state or local candidate.

BCRA § 101(b); FECA § 301(20)(B); 2 U.S.C. § 431(20)(B).

1) The Levin Amendment

Section 323(b)(2)-commonly referred to as the "Levin Amendment"-carves out an exception to the general rule in section 323(b)(1). BCRA § 101(a); FECA § 323(b)(2); 2 U.S.C. § 441i(b)(2). Section 323(b)(2) permits state and local parties to use an allocation of nonfederal money ("Levin money" or "Levin funds") for voter registration, voter identification, and GOTV activities provided that certain specified conditions are met. First, the permitted activities may not refer to a clearly identified federal candidate. Second, those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate. Third, no single donor may donate more than $10,000 to a state or local party annually for those activities. Finally, all money (federal and Levin money alike) spent on such activities must be "homegrown"-i.e., raised solely by the spending state or local party-and may not be transferred from or raised in conjunction with any national party committee, federal officeholder or candidate, or other state or local party. *See* BCRA § 101(a); FECA § § 323(b)(2)(B), 323(b)(2)(C); 2 U.S.C. § § 441i(b)(2)(B), 441i (b)(2)(C).



c. *Fundraising Costs: Section 323(c)*

Section 323(c) requires national, state, and local parties to use federally- regulated funds to raise any money that will be used on "federal election activities," as defined in the statute. BCRA § 101(a); FECA § 323(c); 2 U.S.C. § 441i(c).

d. *Tax Exempt Organization Soft Money Ban: Section 323(d)*

Section 323(d) prohibits any political party committee-national, state, or local-or its agents from "solicit[ing]'' funds for or "mak[ing] or direct [ing]'' any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other than a state or local party or the authorized campaign committee of a candidate for state or local office). BCRA § 101(a); FECA § § 323(d)(1), 323(d)(2); 2 U.S.C. § § 441i(d)(1), 441i(d)(2). A section 501(c) organization is an organization that is tax exempt as described in that section of the tax code-a good example of which is a charity. A section 527 organization is a political committee that is exempt from taxation. *See* 26 U.S.C. § 527(a) ("A political organization shall be subject to taxation under this subtitle only to the extent provided in this section. A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes."); *see also* 26 U.S.C. § § 527(e)(1) and (2) (defining a "political organization" as an organization that is "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for . . . the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office

or office in a political organization, or the election of Presidential or Vice- Presidential electors").

e. *Federal Officeholder and Candidate Soft Money Ban: Section 323(e)*

Section 323(e) generally prohibits federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending any soft money[42] (i) in connection with a federal election or (ii) in connection with a state or local election. BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441(e)(1). There are, however, several exceptions to the general prohibition in section 323(e). First, a federal officeholder or candidate may solicit money for state and local candidates from sources and in amounts that would be allowed by Federal law. BCRA § 101(a); FECA § § 323(e)(1)(B)(i), 323(e)(1)(B)(ii); 2 U.S.C. § § 441i(e)(1)(B)(i), 441i(e)(1)(B)(ii). Second, the federal officeholder or candidate ban on nonfederal funds does not apply to the solicitation, receipt, or spending of funds by an individual who is also a candidate for state or local office solely in connection with such election. BCRA § 101(a); FECA § 323(e)(2); 2 U.S.C. § 441i(e)(2). Third, a federal officeholder or candidate may attend or speak at a fundraising event for a state or local political party. BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3). Fourth, a federal officeholder or candidate may solicit such funds on behalf of any tax- exempt section 501 organization that spends money in connection with federal elections in

[42] If the federal candidate or officeholder is soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office, the funds must "be subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441(e)(1)(A). However, if the candidate is doing so in connection with a state or local election, then the funds must be "not in excess of the amounts permitted with respect to contributions to candidates and political committees" and "not from sources prohibited by the Act from making contributions in connection with an election for Federal office." 2 U.S.C. § 441(e)(1)(B).



either of two instances: (i) he or she may solicit unlimited funds for a section 501 organization whose "principal purpose" is not voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per person per year specifically for voter registration, voter identification, or GOTV activity, or for an organization whose "principal purpose" is to conduct any or all of those activities. *See* BCRA § 101(a); FECA § § 323(e)(4); 2 U.S.C. § 441i(e)(4).

f. *State Candidate Soft Money Ban: Section 323(f)*

Lastly, Section 323(f) generally prohibits state officeholders or candidates from spending soft money (that is, money not raised pursuant to FECA's regulations) on any public communication that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office. BCRA § 101(a); FECA § 323(f); 2 U.S.C. § 441i(f).

2. Title II: Noncandidate Campaign Expenditures

a. *Definition of Electioneering Communication: Section 201*

Section 201[43] of BCRA amends section 304 of FECA by adding the following definition of an "electioneering communication":

> (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

[43] Section 201 also contains disclosure provisions which are discussed *infra*.

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A).[44] Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by cable, broadcast, or satellite, (b) must refer to a clearly identified Federal candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. *Id.* The fact that the communication must be "targeted to the relevant electorate," means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C). For example, if a broadcast advertisement refers to a federal House candidate within 60 days of the general election, but can only be received by 30,000 individuals, it is not an electioneering communication and permissibly could be made with funds from the general treasury of a corporation or labor union.

[44] The regulations implementing this definition clarify that the operative event for making an electioneering communication is the "dissemination of the communication, rather than the disbursement of funds related to creating a communication." Electioneering Communications, 67 Fed. Reg. 65190, 65191 (Oct. 23, 2002).



In the event that a court of competent jurisdiction finds the definition of electioneering communication to be constitutionally infirm, the statute provides a backup definition:

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). With the exception of the final clause, the fallback definition essentially tracks the language found in section 301(20)(A)(iii) of FECA which addresses one of the four activities which fall within the definition of the term Federal Election Activity. BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431 (20)(A)(iii).

b. *Prohibition of Corporate and Labor Union General Treasury Fund Disbursements for Electioneering Communications: Section 203 Rules Relating to Certain Targeted Electioneering Communications: Section 204*

Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover electioneering communications. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2) ("[T]he term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in [FECA], and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any

candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section *or for any applicable electioneering communication.*''(emphasis added). The prohibition on electioneering communications only applies to the general treasury funds of national banks, corporations, and labor unions, or any other person using funds donated by these entities.

Like the original prohibition in section 441b, Section 203 of BCRA, is not an absolute ban on corporate and labor union spending on "electioneering communication." FECA expressly permits corporations and labor unions to create "separate segregated fund[s] to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C). These segregated funds are known as political committees under the Act (or PACs). 2 U.S.C. § 431(4)(B) (A political committee is "any separate segregated fund established under the provisions of section 441b(b) of this title."). These segregated accounts are subject to the source and amount limitations contained in FECA. *See, e.g.*, 2 U.S.C. § 441a(a)(1)(C) (providing that no person shall make contributions "to any other political committee in any calendar year which, in the aggregate, exceed $5,000"). To fund the segregated account, a corporation is permitted to solicit contributions from "its stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(4)(A)(i).[45] Likewise, in establishing their segregated funds, labor unions are allowed to solicit contributions to the fund from their members and their families. 2 U.S.C. § 441b(b)(4)(A)(ii). From these accounts, corporations and labor unions are permitted to make contributions to federal candidates and spend unlimited amounts of segregated funds on electioneering communications and independent expenditures, provided that federal funds are used to pay for these activities.

[45] For membership organizations, cooperatives, or corporations without capital stock, solicitations of the membership are permitted to fund the segregated account. 2 U.S.C. § 441b(b)(4)(C).



*Snowe-Jeffords Provision*

BCRA Section 203 provides an exception to certain types of nonprofit corporations from the requirement that corporations, labor unions, and national banks must use separately segregated funds[46]—and not general treasury funds to pay for electioneering communications. However, this exception, commonly known as the "Snowe-Jeffords Provision" after its sponsors, was later, in effect, withdrawn by Section 204, known as the "Wellstone Amendment," *see infra* at 69; *compare* BCRA § 203; FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2) (Snowe-Jeffords Provision) *with* BCRA § 204; FECA § 316(c)(6)(a); 2 U.S.C. § 441b(c)(6)(A) (Wellstone Amendment).

The Snowe-Jeffords Provision permits nonprofit organizations to use their general treasury funds to pay for electioneering communications if they are incorporated under Section 501(c)(4) and/or Section 527(e)(1) of the Internal Revenue Code. This exception for nonprofit corporations is

[46] As discussed *supra*, FECA section 304(f)(2)(E) refers to a segregated bank account made up of contributions for electioneering communications from United States citizens, nationals, or permanent residents where all the names and addresses of all contributors who contribute an aggregate amount of $1,000 or more to the account is disclosed. Also as discussed *supra*, FECA section 304(f)(2)(F) refers to electioneering communications paid from a general treasury. If an electioneering communication is paid for with general treasury funds under section 304(f)(2)(F), then all contributors of more than $1,000 in a calendar year have to disclose their name and address. Hence, under the Snowe-Jeffords Provision, 501(c)(4) organizations and 527(e)(1) organizations, who are permitted to make electioneering communications with money contributed by individuals, must disclose the names and addresses of those individuals who contributed the funds to pay for the electioneering communication. BCRA § 203; FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2).

an expansion of the law as it existed prior to BCRA. While FECA did not provide an exception from its separately segregated fund requirement for nonprofit corporations, the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*") had provided an as-applied exception for nonprofit corporations which satisfied certain criteria set forth by the Supreme Court.[47] Under BCRA, it is not necessary that a nonprofit corporation establish that it has met the three criteria of *MCFL* in order to use its general treasury funds to pay for electioneering communications; instead, it may do so under Snowe- Jeffords simply by virtue of being incorporated under Sections 501(c)(4) or 527(e)(1).

While a nonprofit corporation under Snowe-Jeffords is permitted to use general treasury funds for electioneering communications, it is important to note that these corporations are not permitted to use funds donated by a corporation, labor union, or national bank to purchase them. Under Snowe-Jeffords, a nonprofit corporation may only use funds donated by individuals to pay for electioneering communications. If a nonprofit corporation, for example, has accepted corporate contributions and mixed those contributions with general treasury funds that contained individual donations, the nonprofit corporation would not be permitted to use their general treasury funds to engage in electioneering communications.

Finally, although Snowe-Jeffords exempts nonprofit corporations from the separately segregated fund require-

[47] That is, 1) whether the corporation is "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; 2) "has no shareholders or other persons affiliated," so that members have "no economic disincentive for disassociating with it if they disagree with its political activity; and 3) the corporation "was not established by a business corporation," and has a policy of refusing "contributions from such entities." *MCFL* at 264.



ment, they are not similarly exempted from the disclosure requirements set forth in Section 201. Nonprofit corporations, like any other entity engaging in electioneering communications, must make public the names and addresses of all contributors who contributed over $1,000 to the account from which the corporation paid for the communications.

*The Wellstone Amendment*

Despite drafting and including the Snowe-Jeffords' provision in the Act, an amendment offered by Senator Paul Wellstone and adopted by the Senate effectively eviscerates the Snowe-Jeffords' Provision from the Act. The "Wellstone Amendment," codified in section 204 of BCRA states that the exemption created by the Snowe-Jeffords Provision for section 501(c)(4) corporations and section 527(e)(1) corporations is inapplicable "in the case of a targeted communication." BCRA § 204; FECA § 316(c)(6)(A); 2 U.S.C. § 441b(c)(6)(A). The Wellstone Amendment describes a "targeted communication" as "an electioneering communication" that is "distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." BCRA § 204; FECA § 316(c)(6)(B); 2 U.S.C. § 441b(c)(6)(B). The direct consequence of the Wellstone Amendment is that organizations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code, or those entities who have received funds from corporations, are not permitted to use their general treasury funds for electioneering communications.

The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 organizations within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law

and the original Snowe-Jeffords exception for these groups will be restored. *See* BCRA § 401 (discussing that BCRA is subject to severability).

* * *

To briefly summarize, section 201 provides two definitions of "electioneering communication," a primary one and a backup definition in the event a court finds the main definition unconstitutional. Section 203, in conjunction with section 204, prohibits corporations and unions from using general treasury funds to pay for an electioneering communication. Corporations and unions need to establish political action committees if they want to engage in electioneering communication.

c. *Disclosure of Electioneering Communications: Section 201*

Section 201 amends Section 304 of FECA, 2 U.S.C. § 434, by requiring disclosures related to electioneering communications. Section 201's disclosure requirements mandate the reporting of "disbursements" for the "direct costs of producing and airing electioneering communications" aggregating more than $10,000 during any calendar year. BCRA 201(a); FECA § 304(f)(1); 2 U.S.C. § 434(f)(1). The reports must be made to the Commission within 24 hours of each "disclosure date." *Id.* The statute defines "disclosure date" as the first time during the calendar year a person's electioneering communication disbursements exceed $10,000, and each subsequent aggregation of $10,000 in electioneering communication disbursements made in the same calendar year. BCRA § 201(a); FECA § 304(f)(4); 2 U.S.C. § 434(f)(4). "Disbursements" under Section 201 include executed contracts to make disbursements for electioneering



communications. BCRA 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).[48]

The section requires the reports, made under penalty of perjury, to include the following information:

- the identities of the person making the disbursement, any person sharing or exercising direction or control over that person, and the custodian of the books and accounts of the person making the disbursement;
- the person's principal place of business, if not an individual;
- the amount of each disbursement over $200 during the statement's period and the identity of the person who received the disbursement;
- the elections to which the electioneering communications pertain and the names of the candidates identified in the communications, if known;
- if the disbursements are made from a segregated account funded solely by direct contributions by individuals for the purpose of making electioneering communication disbursements, the names and addresses of all persons who contributed over $1,000 to the account during the calendar year; and
- if the disbursements are made from a different source, the names and addresses of all contributors to that source who contributed over $1,000 during the calendar year.

BCRA 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2).

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[48] The provision states, "For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement." BCRA 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).

d. *Coordinated Communications as Contributions: Section 202*

Section 202 of BCRA amends Section 315(a)(7) of FECA, 2 U.S.C. 441a(a)(7) by adding the following language:

> If—
>
> (i) any person makes, or contracts to make, any disbursement for any electioneering communication . . . ; and
>
> (ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;
>
> such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party

BCRA § 202; FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C). Section 202 essentially makes clear the import of the definitions of "electioneering communication" and "coordination" in Sections 201 and 214; coordinated electioneering communications constitute contributions.

e. *Reporting Requirements for Certain Independent Expenditures: Section 212*

Section 212 amends Section 304 of FECA (2 U.S.C. § 434) by adding certain disclosure requirements for independent expenditures.[49] The provision requires persons, including

[49] Section 211 defines "independent expenditure" as:

> an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

BCRA § 211; FECA § 301; 2 U.S.C. § 431(17).



political committees, to report independent expenditures, or contracts to make such expenditures, aggregating $1,000 or more after the twentieth day before the date of an election.[50] BCRA § 212; FECA § 304(g)(1)(A); 2 U.S.C. § 434(g)(1)(A). These reports must be made within 24 hours of making the expenditure or the contract to make the expenditure. *Id.* Such reports must be supplemented within 24 hours of making additional expenditure contracts or expenditures aggregating an additional $1,000 toward the same election. BCRA § 212; FECA § 304(g)(1)(B); 2 U.S.C. § 434(g)(1)(B). For expenditure contracts or expenditures made more than twenty days before an election, persons must also file reports but only after the expenditures aggregate to $10,000 or more and they have 48 hours in which to file their disclosure. BCRA § 212; FECA § 304(g)(2)(A); 2 U.S.C. § 434(g)(2)(A). These reports must also be supplemented

[50] The reports must be filed with the FEC and must include "the name of each candidate whom an expenditure is intended to support or oppose," BCRA § 212; FECA § 304; 2 U.S.C. § 434(g)(3)(B), as well as the name and address of each

> person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee

2 U.S.C. § 434(b)(6)(B)(iii).

whenever additional expenditure contracts or expenditures aggregate an additional $10,000 toward the same election. BCRA § 212; FECA § 304(g)(2)(B); 2 U.S.C. § 434(g)(2)(B).

f. *Coordination with Candidates or Political Parties: Section 214*

The Supreme Court has found treating coordinated expenditures as contributions constitutionally justifiable under the rationale of preventing circumvention. *Buckley*, 424 U.S. at 47 ("[C]ontribution ceilings . . . prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions."). Section 214 makes changes to FECA's coordinated expenditure regime.

Section 214(a) amends Section 315(a)(7)(B) of FECA, 2 U.S.C. § 441a(a)(7)(B), by adding the following provision:

> (ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee

BCRA § 214(a); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii). This language is virtually identical to that in 2 U.S.C. § 441a(a)(7)(B)(i)[51], passed in 1976 as an amendment to FECA, which defines expenditures made in coordination with candidates.[52]

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[51] In *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*), the Supreme Court considered the applicability of Section 441a(a)(7)(B)(i) to political party expenditures. Despite the fact that four Justices found the provision overbroad, *Colorado II*, 533 U.S. at 467 (Thomas, J., dissenting), the majority found that Section 441a(a)(7)(B)(i) applied to political party expenditures coordinated with candidates, *id* at 465.

[52] As presently codified, the provision states: "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate". 2 U.S.C. § 441a(a)(7)(B)(i).



Section 214 also repeals the FEC's regulations "on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees," and requires the FEC to promulgate new regulations. BCRA § 214(b), (c). Congress instructed that the new regulations "shall not require agreement or formal collaboration to establish coordination." BCRA § 214(c); 2 U.S.C. § 441a note. Congress also instructed that the regulations should address

> (1) payments for the republication of campaign materials;
>
> (2) payments for the use of a common vendor;
>
> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
>
> (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

*Id.*

Lastly, Section 214 amends Section 316(b)(2) of FECA, 2 U.S.C. 441b(b)(2), to include within the meaning of "contributions or expenditures by national banks, corporations, or labor organizations," the definitions of "contribution or expenditure" found in Section 301 of FECA, 2 U.S.C. § 431(8), (9). BCRA § 214(d).

3. Title III: Miscellaneous

a. *Use of Contributed Amount for Certain Purposes: Section 301*

Section 301 sets forth the permitted and prohibited uses of contributions. For example, a candidate can transfer contributions to political parties but cannot convert contributions to personal use. BCRA § 301; FECA § 313; 2 U.S.C. § 439a.

b. *"The Millionaire Provisions": Sections 304, 316, & 319*

In Sections 304, 316, and 319 of BCRA, Congress allowed opponents of self-financed candidates to raise money in larger increments and, in certain circumstances, to accept unlimited coordinated party expenditures. Specifically, the provisions state that if a self-financed candidate's "opposition personal fund amount"[53] exceeds a threshold amount,[54] then the candidate's opponent can raise funds through increased contribution limits. BCRA § 304(a); FECA § 315(i); 2 U.S.C. § 441a(i); BCRA § 319; FECA § 315A; 2 U.S.C. § 441a-1. Moreover, if the opposition personal fund amount is ten times the threshold amount in Senate races, or merely exceeds the

[53] The "opposition personal funds amount" is not simply the amount of personal funds expended by a self-financed candidate. It also takes into account the gross receipts advantage of both candidate's authorized committees so that incumbents with large war chests will not be able to take advantage of the new law unless the self-financed candidate expends an even greater amount of personal funds. BCRA § § 304(a)(ii); FECA § 315(i)(1)(D); 2 U.S.C. § 441a(i)(1)(D); BCRA § 316; FECA § 315(i)(1)(E); 2 U.S.C. § 441a(i)(1)(E); *see also* BCRA § 319(a); FECA § 315A(a)(2); 2 U.S.C § 441a-1(a)(2).

[54] The threshold amount in Senate races is equal to the sum of $150,000 plus $.04 multiplied by the voting age population in the candidate's state, BCRA § 304(a)(2); FECA § 315(i)(1)(B); 2 U.S.C. § 441a(i)(1)(B), while in House races the threshold amount is simply $350,000. BCRA § 319(a)(1); FECA § 315A(a)(1); 2 U.S.C. § 441a-1(a)(1).



$350,000 threshold for House races, the self-financed candidate's opponent can also be exempted from limits on coordinated party expenditures imposed by 2 U.S.C. § 441a(d). Any contributions or party expenditures under the increased limits is capped to the amount spent by the self-financed candidate: the enhanced contributions cannot exceed 110% and 100% of the opposition personal funds amount for Senate and House races respectively.

c. *Lowest Unit Charged: Section 305*

In the 1972 FECA legislation, Congress added the "lowest unit charge" provision to the Communications Act of 1934. The provision states that, for forty-five days before a primary or sixty days before a general election, the broadcast stations have to sell a qualified candidate the "lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. 315(b)(1). BCRA Section 305, however, denies a candidate the lowest unit charge for broadcast advertisements on radio and television unless the candidate "provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office" in any broadcast. BCRA § 305; FECA § 315(b); 47 U.S.C. § 315(b). The candidate can be exempted from this provision, and thus be eligible for the lowest unit charge without such a promise, if the candidate clearly identifies himself at the end of the broadcast and states that he approves of the broadcast. In a television broadcast, this message must include the candidate's image for at least four seconds. *Id.*

d. *Increased Limits for Contributions and Indexing of Limits: Section 307*

Section 307(a)(1) increases the amount individuals can contribute to candidates per election from $1000 to $2000. BCRA § 307(a)(1); FECA § 315(a)(1)(A); 2 U.S.C. § 441a(a)

(1)(A). It also changes the aggregate amount of contributions a donor can give to candidates and political committees (including parties) from $25,000 in a calendar year to $37,500 in a two-year period to candidates and $57,500 in a two-year period to political committees. BCRA § 307(b); FECA § 315(a)(3)(A); 2 U.S.C. § 441a(3)(A). Congress also increased the limits to a national party committee by $5,000 and doubled the amount of money individuals can donate to a state party committee, so that individuals may now contribute no more than $25,000 per calendar year to a national party committee, no more than $10,000 per calendar year to a state committee, and no more than $5,000 per calendar year to a local committee. BCRA § § 102, 307(a)(2); FECA § 315(a)(1)(B), (D); 2 U.S.C. 441a(a)(1)(B), 441a(a)(1)(C), 441a(a)(1)(D). Finally, Congress also indexed all contributions for inflation, except for limits on contributions to state and local party committees. BCRA § 307(d); 2 U.S.C. § 441a(c).

e. *Identification of Sponsors: Section 311*

Section 311 requires that "whenever any person . . . makes a disbursement for an electioneering communication," the communication, if it was authorized by a candidate or the candidate's political committee, must clearly identify the candidate or the candidate's political committee. If the communication was not authorized by the candidate or the candidate's political committee, then the communication "shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." BCRA § 311; FECA § 318(a)(3); 2 U.S.C. § 441d(a)(3).

f. *Prohibition of Donations by Minors: Section 318*

In Section 318, Congress prohibited minors, defined as any children under eighteen years of age, from making donations,



regardless of the amount, to candidates or political parties. BCRA § 318; FECA § 324; 2 U.S.C. § 441k.

4. Title V: Additional Disclosure Provisions

a. *Public Access to Broadcasting Records: Section 504*

In Section 504, Congress requires broadcast licensees to collect and disclose records of any "request to purchase broadcast time" that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to Federal office," and "a national legislative issue of public importance." BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1). The record must include whether the request to purchase was accepted or rejected; the rate charged for the broadcast; the date and time on which the communication aired; the class of time that is purchased; the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers; in the case of a request on behalf of a candidate, the name of the candidate, the authorized committee, and the treasurer of the committee; and in the case of any other request, the name of the person purchasing the time, the name and contact information for such person, and a list of chief executive officers or members of the executive committee or board of directors. *Id.*

## III. FINDINGS OF FACT

The Findings of Fact include a description of the identities of the parties and include findings related to the disclosure provisions included in this *per curiam* opinion.

A. *Parties to the Litigation* [55]

[55] As of the May 7, 2002, deadline for amendment of pleadings, intervention orjoinder of additional parties and consolidation of additional cases, *see* Scheduling Order of 4/24/02, 84 plaintiffs were parties to the consolidated actions. Since then, seven plaintiffs-the Alabama Republican Executive Committee, Martine J. Connors, the Jefferson County Republican Executive Committee, the Christian Coalition of America, Inc., the Libertarian Party of Illinois, Inc., the DuPage Political Action Council, Inc., and the National Association of Wholesaler-Distributors-have been dismissed from the suit without prejudice. *See generally* Orders of 8/15/02, 9/13/02, 9/18/02, and 9/30/02 Dismissing Pls. Without Prejudice.

Remaining in the suit are 77 plaintiffs in 11 actions: in No. 02-CV-0582 are Senator Mitch McConnell, Representative Bob Barr, Representative Mike Pence, Alabama Attorney General William H. Pryor, the Libertarian National Committee, Inc., the American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, the Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., the National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, the National Right to Work Committee, 60 Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. d/b/a ProEnglish, Thomas McInerney, Barret Austin O'Brock and Trevor M. Southerland (collectively, the *McConnell* plaintiffs); in No. 02-CV-0581 are the NRA and National Rifle Association Political Victory Fund (collectively, the *NRA* plaintiffs); in No. 02-CV-0633 are Emily Echols, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid and Zachary C. White (collectively, the *Echols* plaintiffs); in No. 02-CV-0751 are the Chamber of Commerce of the United States, the National Association of Manufacturers, National Association of Wholesaler-Distributors, and U.S. Chamber Political Action Committee (collectively, the *Chamber of Commerce* plaintiffs); in No. 02-CV-0753 is the National Association of Broadcasters; in No. 02-CV-0754 are the American Federation of Labor and Congress of Industrial Organizations and AFL-CIO Committee on Political Education Political Contributions Committee (collectively, the *AFL-CIO* plaintiffs); in No. 02-CV-0781 are Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud and Carla Howell (collectively, the *Paul*



1. Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and is a member of the Republican Party. McConnell Aff. ¶ 1. He has long been active in the Republican Party at the national, state and local levels. *Id.* ¶ 2. Senator McConnell was first elected in 1984, was reelected in 1990, 1996, and was a candidate for election in 2002. *Id.* ¶ 7.

plaintiffs); in No. 02-CV-0874 are the Republican National Committee, Mike Duncan, Republican Party of Colorado, Republican Party of Ohio, Republican Party of New Mexico, and Dallas County (Iowa), Republican Central Committee (collectively, the *RNC* plaintiffs); in No. 02-CV-0875 are the California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy J. Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas R. Boyd, Sr., (collectively, the *CDP* plaintiffs); in No. 02-CV-0877 are Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now (collectively, the *Adams* plaintiffs); and in No. 02-CV-0881 are Representative Bennie G. Thompson and Representative Earl F. Hilliard (collectively, the *Thompson* plaintiffs).

The 17 defendants in these consolidated actions are the Federal Election Commission; the United States of America; the United States Department of Justice; the Federal Communications Commission; John Ashcroft, in his official capacity as Attorney General of the United States of America; David M. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas and Michael E. Toner, in their official capacities as Commissioners of the FEC; and Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (collectively, the Intervenors), as intervening defendants.

The Court finds it unnecessary to make findings with respect to all 77 Plaintiffs and 17 Defendants in these actions and therefore the Findings of Fact reflect the primary parties in this litigation.

2. William H. Pryor, Jr. is Alabama Attorney General and was a candidate for reelection as Alabama Attorney General in 2002. Pryor Decl. ¶ 2.

3. The Libertarian National Committee, Inc. ("LNC") is the governing body of the Libertarian Party at the national level. Dasbach Decl. ¶ 4. The LNC is a non-profit corporation incorporated in the District of Columbia and governed by section 527 of the Internal Revenue Code. *Id.* The LNC represents and advocates the principle that all individuals have the right to live in whatever manner they choose so long as they do not forcibly interfere with the right of others to do the same. *Id.*

4. The American Civil Liberties Union ("ACLU") is a tax-exempt corporation incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. Romero Decl. ¶ 1. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members "dedicated to the principles of liberty and equality embodied in the Constitution." *Id.*

5. Associated Builders and Contractors, Inc. ("ABC") is a non-profit tax- exempt organization governed by section 501(c)(6) of the Internal Revenue code, incorporated in Maryland, and is funded primarily by membership dues. Monroe Direct Test. ¶ 3. It is a national trade association representing more than 23,000 contractors and related firms in the construction industry. *Id.* ABC's members, which include both unionized and non-union employers, "share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation." *Id.*

6. Associated Builders and Contractors Political Action Committee ("ABC PAC") is a connected political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of ABC



pursuant to 2 U.S.C. § 441b(b). *Id.* ¶ 22. ABC PAC makes contributions to federal candidates who support the principles of ABC and funds independent expenditures for communications on their behalf. *Id.*

7. The Club for Growth, Inc. ("The Club") is a nationwide membership organization dedicated to advancing public policies that promote economic growth. Keating Decl. ¶ 5. The Club is a Virginia corporation organized under section 527 of the Internal Revenue Code. McConnell Second Am. Compl. ¶ 29. The Club "is dedicated to promoting the election of pro-growth, pro-freedom candidates through the bundling of political contributions and issue advocacy campaigns." Keating Decl. ¶ 6. The Club for Growth advocates tax rate reduction, fundamental tax reform, tax simplification, capital gains tax reduction, estate tax repeal, overall reduction in government spending, school choice, and personal investment of Social Security. *Id.* ¶ 5.

8. The National Right to Life Committee ("NRLC") is a tax-exempt corporation incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. O'Steen Decl. ¶ 4. The NRLC is a nationwide, non-profit, non-partisan organization with approximately 3,000 local chapters and fifty state affiliates dedicated to "promoting respect for the worth and dignity of all human life from conception to natural death." *Id.* ¶ ¶ 5, 3.

9. The National Right to Life Educational Trust Fund ("NRL-ETF") is an organization governed by section 501(c)(3) of the Internal Revenue code. *Id.* ¶ 16. NRL-ETF sponsors educational advertising and develops materials detailing "fetal development, abortion's impact on America, and the threat of euthanasia." *Id.* ¶ 17.

10. The National Right to Life Political Action Committee ("NRL PAC"), organized in 1979, is an internal § 527 fund of

NRLC that is registered with the FEC as a PAC subject to FECA. O'Steen Decl. ¶ 24.

11. Thomas E. McInerney is a U.S. citizen, a registered voter in the State of New York and a member of and contributor to various Republican Party organizations and committees at the national, state and local levels. McInerney Aff. ¶ 1.

12. Barret Austin O'Brock is a U.S. citizen and a resident of the State of Louisiana. O'Brock Decl. ¶ 1. He is fourteen years of age and intends to make contributions to federal candidates in future elections, including the 2004 election. *Id.* ¶ ¶ 2-3.

13. The National Rifle Association ("NRA") is a tax-exempt corporation governed by section 501(c)(4) of the Internal Revenue Code and incorporated in the State of New York. NRA Compl. ¶ 8. The primary purpose of the NRA is to preserve and protect the Second Amendment's guarantee that individuals shall have the right to "keep and bear arms." LaPierre Decl. ¶ 2. In addition, the NRA promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety. *Id.* The NRA has approximately four million members and represents their views on legislative and public policy issues before federal, state and local officials and the general public. NRA Compl. ¶ 8.

14. The National Rifle Association Political Victory Fund ("NRA PVF") is a connected political committee governed by 2 U.S.C. § 431(4) and section 527(e)(1) of the Internal Revenue Code and is a separate segregated fund of the NRA pursuant to 2 U.S.C. § 441b(b). NRA Compl. ¶ 9.

13. Emily Echols, Hannah and Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are U.S. citizens who range in age from twelve to sixteen. Echols Pls.' Proposed Findings of Fact ¶ 45. They intend to seek out



and contribute to federal candidates "who represent their views and beliefs on important questions like the right to life of children before birth, and on the size of government." *Id.* ¶ 44.

14. The Chamber of Commerce ("The Chamber") is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. Josten Direct Trial Test. ¶ 3. The Chamber is the world's largest not-for-profit business federation, representing over 3,000,000 businesses and business associations. *Id.*

15. The U.S. Chamber Political Action Committee ("U.S. Chamber PAC") is a connected political committee organized under section 527(e)(1) of the Internal Revenue Code and is registered with the FEC. Josten Direct Trial Test. ¶ 26. U.S. Chamber PAC is funded by contributions voluntarily made by individual Chamber of Commerce executives, administrative employees, members and their families. *Id.* ¶ 27.

16. The National Association of Manufacturers ("NAM") is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code and is the oldest and largest broad-based industrial trade association in the United States. Huard Direct Trial Test. ¶ 2. Its membership comprises 14,000 companies and 350 member associations. *Id.*

17. The National Association of Broadcasters ("NAB") is a non-profit corporation that serves as a trade association of radio and television stations and broadcasting networks in the United States. Goodman Decl. ¶ 3. NAB serves and represents the American broadcasting industry, composed of approximately 7,300 member stations. *Id.* All of NAB's voting members are broadcast licensees within the meaning of the Communications Act. *Id.*

18. The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a national labor federation comprised of 66 national and international labor

unions that, collectively, have a total of approximately 13 million members. G. Shea Decl. ¶ 3. The AFL-CIO is a tax-exempt organization under Section 501(c)(5) of the Internal Revenue Code. *Id.* The AFL-CIO also includes 51 state labor federations, nearly 580 area and central labor councils and numerous trade and industrial departments. *Id.* ¶ ¶ 6,7, 9. One of the four major missions of the AFL-CIO is to provide "an effective political voice to workers on public issues that affect their lives." *Id.* ¶ 4b.

19. Congressman Ron Paul is a Member of the United States House of Representatives from the Fourteenth Congressional District of Texas and is a member of the Republican Party. Paul Decl. ¶ 1. He was first elected to represent the Fourteenth Congressional District of Texas in 1996, *id.*, and also served as a Member of the House of Representatives for the Twenty-Second Congressional District of Texas, first elected in 1976 and to successive terms until 1984, *id.* ¶ 2. Congressman Paul is a registered voter in the state of Texas, a donor to the campaigns of candidates for federal office, and a fundraiser and recipient of campaign contributions. Paul Pls.' Compl. ¶ 11. He will face reelection in 2004. Paul Decl. ¶ 1.

20. Gun Owners of America, Inc. is a not-for-profit, tax-exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Pratt Decl. ¶ 2. It is dedicated primarily to defending the rights that its members believe are guaranteed by the Second Amendment to the Constitution; its principal function is the dissemination of information concerning such rights through educational programs and advocacy. *Id.* ¶ 3.

21. Gun Owners of America Political Victory Fund is a connected political committee governed by 2 U.S.C. § 431 and is a separate segregated fund of Gun Owners of America. *Id.* ¶ 4.



22. RealCampaignFinance.Org is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Babka Decl. ¶ 2. It is dedicated to defending the campaign and election-related rights its members believe are guaranteed by the First Amendment to the Constitution through educational programs and advocacy. *Id.* ¶ 3.

23. Citizens United is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Bossie Decl. ¶ 2. It is dedicated to the principles of limited government and national sovereignty and to defending the rights its members believe are secured in the United States Constitution; its principal function is the dissemination of information concerning such beliefs and advocacy. *Id.* ¶ 3.

24. Citizens United Political Victory Fund is a connected political committee governed by 2 U.S.C. § 431 and is a separate segregated fund of Citizens United. *Id.* ¶ 4.

25. Michael Cloud was the Libertarian Party's candidate for United States Senate from the Commonwealth of Massachusetts in the 2002 election and is a registered voter. Cloud Decl. ¶ 1.

26. Carla Howell was the Libertarian Party's candidate for Governor of the Commonwealth of Massachusetts in the 2002 election and is a registered voter. Howell Decl. ¶ ¶ 1-2. She was also the Libertarian Party's candidate for election to the United States Senate for the Commonwealth of Massachusetts in the 2000 election. *Id.* ¶ ¶ 2-3.

27. The Republican National Committee ('RNC") is an unincorporated association created and governed by The Rules of te Republican Party. Josefiak Decl. ¶ 13. It consists of three members from the Republican Party in each of the fifty States, the District of Columbia, Puerto Rico, American Somoa, Guam, and the U.S. Virgin Islands. Duncan Decl. ¶ 4;

*see also* Josefiak Decl. ¶ 15. Each state and territorial Republican Party elects a national committeeman and a national committeewoman. Duncan Decl. ¶ 4; Josefiak Decl. ¶ 15. In addition, the state and territorial Republican Party chairmen serve as members of the RNC. Duncan Decl. at ¶ 4; Josefiak Decl. ¶ 15.

28. Mike Duncan is a member of the RNC from the State of Kentucky and currently serves as the General Counsel of the RNC. Duncan Decl. ¶ 5. Prior to becoming General Counsel, he was Treasurer of the RNC and in that capacity signed all RNC reports filed with the FEC. *See id.* In both his official capacity as an officer of the RNC and in his personal capacity, Duncan has participated in and (unless prohibited by BCRA) will continue to participate in national, state and local political party activities. *Id.* ¶ ¶ 6, 9. He will also (unless prohibited by BCRA) continue to solicit, receive, or direct non- federal funds to other persons. *See id.* ¶ ¶ 8-9.

29. The Republican Party of New Mexico is the state party committee of the Republican Party in New Mexico. *See* Dendahl Decl. ¶ ¶ 3-4. It supports federal, state and local candidates for office in New Mexico and promotes Republican positions on public policy issues. *Id.* Under New Mexico law, the Republican Party of New Mexico is permitted to raise and spend corporate, labor union and individual funds in unlimited amounts in support of state and local candidates. *See* N.M. Stat. Ann. § § 1-19-25 to 1-19-36 (1978); Dendahl Decl. ¶ ¶ 5-7.

30. The Dallas County (Iowa) Republican County Central Committee is a local political party committee that the FEC has deemed independent of any state or national political party committee. Josefiak Decl. ¶ 21. It is actively involved in supporting state and local candidates for office in Iowa. *Id.*

31. The California Democratic Party ("CDP") is an unincorporated association of approximately seven million



members and is the authorized Democratic Party of the State of California. Bowler Decl. ¶ 2. The CDP performs many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote and generic party-building activities; and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive federal and state regulation. *Id.* The CDP is required by state law to govern itself through the Democratic State Central Committee (DSCC). *Id.* ¶ 3. The DSCC is made up of approximately 2,710 members, about 849 of whom are elected by the 58 county central committees. *Id.* Other members serve on the DSCC because of their status as federal or state officials, as nominees of the CDP, as members of the Democratic National Committee (DNC) from California or as elected representatives of 80 Assembly District Committees (AD Committees). *Id.* CDP bylaws provide for local party AD Committees, which elect delegates to the DSCC and are the districtlevel organizational blocks of the CDP. *Id.* ¶ 4. The AD Committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *Id.*

32. Art Torres is the elected Chair of the CDP. Torres Decl. ¶ 1. Torres also serves on the DNC and has been elected by the DNC to serve on the DNC Executive Committee. *Id.* ¶ 3. As Chair of the CDP, Torres assists the CDP and county central committees in fundraising efforts by meeting and talking regularly with potential donors and attending fundraising events. *Id.* ¶ 2; *see also* Bowler Decl. ¶ 5

33. The Yolo County Democratic Central Committee is one of the 58 county central committees authorized and

governed by the California Elections Code. CDP Pls.' Compl. ¶ 11; *see also* Bowler Decl. ¶ ¶ 3-4. Members of the county central committees are elected at each statewide primary election. Bowler Decl. ¶ 4. All members of the CDP who are also state senators, members of the state assembly or Members of the Congress serve as *ex officio* members of their respective county central committees. *Id.* The county central committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and act as liaisons with the campaign organizations of Democratic candidates in their area. *Id.*

34. The California Republican Party ("CRP") is an association of over five million members and is the authorized Republican Party of the State of California. Morgan Aff. ¶ ¶ 3-4. The CRP performs many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote and generic party-building activities; and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive federal and state regulation. *Id.* ¶ 4. The CRP is governed by the Republican State Central Committee (RSCC). *Id.* ¶ 5. The RSCC consists of about 1,500 regular and appointive members. *Id.* The regular members include federal and state officeholders as well as the CRP's nominees for governor, seven other state constitutional offices, United States Senate, 52 congressional districts, 40 state senate districts, 80 state assembly districts and four State Board of Equalization districts. *Id.* The RSCC also includes the chairmen of the 58 county central committees and the chairmen of volunteer party organizations. *Id.* ¶ 6. The CRP operates as well through (1) a 100-member Executive Committee, which includes federal and state office holders and 16 representatives of county central committees; and (2)



a 25- member Board of Directors, which includes a Member of Congress appointed by the delegation, three state elected officeholders and representatives from an association of Republican county central committee chairmen. *Id.* Under the CRP's bylaws and the RNC's rules, the CRP is part of the RNC. *Id.* ¶ 8. The CRP's elected chairman is a member of theRNC. *Id.* The CRP elects two other representatives to the RNC—a national committeeman and national committee-woman, each of whom is a member of the CRP Executive Committee and Board of Directors. *Id.*

35. Timothy J. Morgan is (1) a member of the RNC; (2) a member of the CRP Executive Committee; and (3) a member of the CRP Board of Directors; he also served as (4) Chairman of the Santa Cruz County Republican Central Committee. Morgan Aff. ¶ 1.

36. The Santa Cruz County Republican Central Committee is one of the 58 county central committees authorized and governed by the California Elections Code. CDP Pls.' Compl. ¶ 19; *see also* Morgan Aff. ¶ 6. Federal officials and candidates who were nominated as party nominees for partisan offices, including State constitutional and legislative offices, the Board of Equalization, and federal offices, including nominees for U.S. Senate and U.S. House of Representatives who represent all or a portion of the area within the county's jurisdiction are *ex officio* members of the Republican county central committee, and participate in its decision-making, either personally or through designated alternates or agents. *Id.*

37. The Federal Election Commission ("FEC") is a government a gency headquartered in Washington, D.C., created pursuant to FECA, 2 U.S.C. § 437(c), and is charged with enforcing the Act as amended by BCRA. David M. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner serve as the commissioners of the FEC.

38. The United States, through the Department of Justice ("DOJ"), is charged with enforcement of the criminal provisions of the Act as amended by BCRA, and has an interest in defending the constitutionality of duly enacted laws of the Nation. United States Mot. to Intervene at 5. John Ashcroft is Attorney General of the United States.

39. The Federal Communications Commission ("FCC") is a government agency headquartered in Washington, D.C., and is charged with enforcing the FECA as amended by BCRA.

40. The intervenors are Members of the Congress who were principal sponsors and authors of BCRA. Senator John McCain is a Republican United States Senator from the State of Arizona. Senator Russell Feingold is a Democratic United States Senator from the State of Wisconsin. Senators McCain and Feingold face reelection in 2004. Senator Olympia Snowe is a Republican United States Senator from the State of Maine. Senator James Jeffords is an Independent United States Senator from the State of Vermont. Senators Snowe and Jeffords face reelection in 2006. Congressman Christopher Shays is a Republican member of the House of Representatives from the Fourth Congressional District in Connecticut. Congressman Martin Meehan is a Democratic member of the House of Representatives from the Fifth Congressional District in Massachusetts.

B. *Findings Regarding BCRA's Disclosure Provisions*

41. The NRA presents evidence that some people have been reluctant to give money to the organization or the NRA PVF, the NRA's PAC, fearing that such contributions would be publicly reported. LaPierre Decl. ¶ 62 [NRA App. at 24-25] ("Throughout the years, hundreds, if not thousands, of NRA members have told me that they do not wish to disclose their contributions to the NRA . . . . If . . . members are forced to disclose their identities, I firmly believe that many will not



make contributions that trigger such disclosure."); Adkins Decl. ¶ ¶ 4-6 [NRA App. at 50] ("A conspicuous and disproportionate number of contributors" to the NRA PVF "contribute just below the $200 disclosure level."). Members who have expressed their desire to keep their contributions confidential have provided a variety of reasons. LaPierre Dep. at 306 ("A lot over the years have said, I donate to you, but gee, I just don't want my neighbors to know. I don't want my school board to know. I don't want my employer to know . . . . I might lose my job. I might not get my school board thing. I might have—I mean, they fear—I mean, when you have as much hate as people have put out on this issue, it's natural for people to fear repercussions."); Adkins Dep. at 15-19 (testifying that notes received from individuals refusing to provide information for disclosure to the FEC did not give the reasons for their objections, or just stated they did not wish to have the information disclosed to the FEC); *id.* at 21-23 (testifying that she had received 3 telephone calls in the previous five or six years from individuals who feared their employer would find out that they donated to the NRA PVF). The NRA does not know the amount those who did protest disclosure gave to the organization. LaPierre Dep at 309; LaPierre Cross at 91; Adkins Dep. at 23. Of the between five and 50 persons estimated to have voiced disclosure concerns to LaPierre in 2000, LaPierre believes "not a lot" of those persons gave the NRA more than $1,000 in 2000 "[b]ecause we don't . . . get a lot of contributions more than $1,000." LaPierre Dep. at 306-309. The average NRA donor donates approximately $30 per year. LaPierre Cross at 92. Beginning in 2003, the NRA's policy is to "pay for [their] television and broadcast programming exclusively out of funds provided by individual members." *Id.* at 93. Mr. LaPierre states that "NRA's position . . . . is that . . . it ought to be disclosed who is running those ads [run with funds from anonymous donors] . . . . [a]nd who pays for the ads." LaPierre Dep. at 294-95 [JDT Vol. 14].

42. Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors ("ABC") and the Treasurer of ABC's PAC, testifies that he had been told that a number of ABC contributors had suffered substantial vandalism after their names were disclosed and that the contributors believed the vandalism was the result of labor unions learning of their contributions. Monroe Cross at 86. He also testified that two corporations refused his solicitations due to their "policy of not supporting [ABC] based on previous incidents . . . . [T]hey did not elaborate." *Id.* at 87. Some contributors to ABC's PAC "specifically donate" less than $200. *Id.* at 88. Monroe believes this practice is the result of the contributors' desire to prevent public disclosure of the contributors' names. *Id.* Two corporations declined Mr. Monroe's solicitations because of "previous incidents," but did not elaborate. *Id.* at 87. Monroe also "believe[s]" that some companies do not contribute because they "do not trust [ABC's] ability to keep . . . information confidential." *Id.* at 89.

43. Stephen Sandherr, Chief Executive Officer of Associated General Contractors of America ("AGC"), testifies in a deposition that between a dozen and two dozen members had expressed concerns to him about their contributions being publicly disclosed. Sandherr Dep. at 43-44. He believes that the number of members who share this concern is much higher but, because the AGC has made an effort to publicize the fact they do not disclose the names of contributors, concerned members do not feel the need to bring the issue up. *Id.* These members expressed two reasons for concern. Some were concerned that if their contributions were made known, "their local building trades would take offense and would threaten actions on the job site or would threaten to make life miserable for them." *Id.* at 45. Others were concerned that if their union became aware of their contribution, they would "cease bargaining over industry advancement funds," that local chapters depend on to support



their activities. *Id.* at 46. The non-unionized members who expressed their concerns about disclosure to Sandherr did not express their reasons for wanting to remain anonymous. *Id.* at 48. No contributor to AGC's PAC ever told Sandherr that they planned to contribute less than $200 in order to prevent disclosure of its identity, and no contributor to the AGC's PAC ever reported being subjected to retaliation from unions for giving money to the PAC. *Id.* at 55-56.

44. Bruce Josten, Executive Vice President for Government Affairs, U.S. Chamber of Commerce, gave deposition testimony that some contributors to "Americans Working for a Real Change," a coalition established to respond to AFL-CIO issue advertisements, did not want to be publicly identified. Josten Dep. at 13-14, 27. The reason these entities gave for not wanting to be identified was that they feared becoming "targets or recipients of corporate campaigns or other types of what some would call union harassment activities." *Id.* at 28.

45. Mr. Romero, the ACLU's legislative director, attests that "[m]any ACLU members and contributors request explicit assurances that their membership will remain confidential and that their contributions will remain anonymous. The ACLU has consistently defended the First Amendment right of its members and donors to remain anonymous if they so choose." Declaration of A. Romero ¶ 5. Mr. Romero notes that "[o]nly 212 individuals contributed more than $1,000 to the organization. *Id.* ¶ 6.

46. A poll conducted by Mark Mellman and Richard Wirthlin, two reputable political pollsters, found that 61 percent of Americans want to know who is paying for political advertisements, while 24 percent say knowing such information does not matter to them. Mark Mellman & Richard Wirthlin, *Research Findings of a Telephone Study Among 1300 Adult Americans* (Sept. 23, 2002) at 20 [DEV 2-Tab 5].

47. At least one study has found that the public has a difficult time determining who is responsible for issue advertisements that identify candidates.

In response to the question asking who paid for an ad, just over 60 percent of survey participants correctly attributed the candidate ads and the pure issue ads to their actual sponsors. Identification of the sponsors of the candidate-oriented issue ads was much more scattered, with most people (38 to 48 percent) assuming in each case that they came from candidates and fewest (9 to 18 percent) assuming that they were paid for by an interest group. These results, of course, suggest that the disclaimers that appear on these ads are almost completely ineffective.

Krasno & Sorauf Expert Report at 78-79 (summarizing results from David B. Magleby, Dictum Without Data: The Myth of Issue Advocacy and Party Building, available at http://www.byu.edu/outsidemonev/dictum/index.html).

48. The problem of determining the true sponsors of issue advertisements is not only experienced by the general public; politicians and political strategists also have difficultly determining the source of these commercials. For example, former Senator Dale Bumpers, relates that

> [o]ne of the most insidious things about soft money "issue ads" is that the ordinary viewer doesn't have a clue as to who paid for the ad. I first noticed this problem in 1996, when I saw several issue ads before it ever dawned on me that those ads were not being paid for by the candidate . . . . At first I just assumed that the ads were paid for by the opposing candidates' campaign funds, though I did think it was very strange that the opposing candidates' names were never mentioned. In those ads, everything is honed in on the candidate the ad is trying to defeat. At that time, I did not know that they were soft money spots.



Declaration of Senator Dale Bumpers ¶ 29 [DEV 6-Tab 10]. Democratic political consultant Terry S. Beckett testifies that

> [t]he Republican Leadership Council ("RLC") also ran so-called "issue ads" on television in the 2000 Congressional campaign . . . . [Two of t]hese ads accuse [Republican Candidate Ric] Keller of acting "like a liberal." I found it [] ironic, not to mention unsettling, to learn of reports that the hundreds of thousands of dollars the RLC spent on these ads trying to defeat Mr. Keller were actually provided by the Florida sugar industry . . . . And the fact that I, a general consultant in this same race with long high-level experience in Florida politics, was not aware until earlier this year of whose money was behind these ads strongly underlines the need for disclosure of this kind of stealth electioneering financed with corporate funds.

Declaration of Terry S. Beckett ("Beckett Decl.") ¶ 14 [DEV 6-Tab 3].[56] Similarly, political media consultant Raymond Strother comments that

> one of the biggest problems that a candidate's media consultant now faces is the lack of disclosure associated with third parties running these ads. A few years ago, Jill Docking ran for the United States Senate against Sam Brownback in Kansas . . . . In the last two weeks of a very tight election, an unidentifiable group came in and poured a million dollars into the race. They ran

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[56] The following is an audio transcript from one of these "Florida sugar industry"—sponsored advertisements:

> Ric Keller has become an embarrassment. He claims to be a conservative but got caught getting help from liberal Democrat Linda Chapin, and Keller's law firm coughed up campaign contributions for liberal Democrat Buddy McKay. Ric Keller even supported the Clinton-Gore billion dollar tax on food. Ric Keller, who proclaims to be a conservative but gets caught acting like a liberal. How embarrassing. How wrong. How Clinton.

Beckett Decl. Ex. 5 [DEV 6-Tab 3].

> television, radio, direct mail, and push polls throughout Kansas telling voters that Jill wasn't a Christian, and all we could find was a fax machine. We had no idea where the money came from. I have had similar experiences in other races as well. Without knowing who is funding the groups that run these ads, we are often unable to correct the distortions.

Declaration of Raymond D. Strother ¶ 15 [DEV 9-Tab 40]. Joe Lamson, campaign manager for Bill Yellowtail's 1996 campaign, testified that

> The Yellowtail campaign had trouble finding out who was running the 1996 Citizens for Reform ads in Montana [which portrayed Yellowtail in a negative light]. As I recall, a local television station pointed us to a group in New Orleans. That group said they didn't know anything, but gave us a telephone number in Oklahoma that turned out to be connected to the J.C. Watts campaign. I believe someone there then flipped us to a phone number in Washington, D.C., and we finally found Citizens for Reform. We later learned that Citizens for Reform was actually a front for Triad, a group that ran broadcast attack ads against many Democrats nationwide in the 1996 election cycle.

Declaration of Joe Lamson ¶ 12 [DEV 7-Tab 26]; *see also* Declaration of Larry LaRocco (former Member of Congress, stating he was never able to find the source of attack advertisements run against him in the 1994 campaign because none of the sponsoring organizations were registered with the FEC); Magleby Expert Report at 29 [DEV 4-Tab 8] (providing examples illustrating the point that "even candidates and their campaign managers are unable to ascertain who some of the groups running ads [in the 2000 campaign] were").



49. Krasno and Sorauf find that:

> Secrecy is one of the outstanding characteristics of issue advertisements, especially those financed by interest groups. As a result, we—and regulators—are hampered by a remarkable paucity of information about them. The media tracking data we have referred to throughout our report fill in some of the blanks, but many key factual questions remain unanswered or may only be answered after painstaking investigation . . . . This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials . . . . Among its various advantages, disclosure is thought to combat corruption by illuminating the dark corners in which undue influence may be exerted far from public view. The idea is that politicians eager for popularity and votes will be loath to enter into situations that cast doubt on their probity; thus, the more these situations are revealed, the stronger the politician's impulse to avoid them. One of the ironies of this litigation is that many of BCRA's opponents are otherwise champions of disclosure . . . . The public's interest in revealing these transactions is countered by the private interest of many groups and donors to keep them secret. Thus, the ability to route money to groups for candidate-oriented issue ads without disclosure has attracted an increasing amount of money to this activity. In the growing opaqueness of campaign financing, the opportunity for donors and officeholders to forge close relationships or strike deals without risk of detection increases, too.

Krasno & Sorauf Expert Report at 73-75 [DEV 1-Tab 2 at 146]. According to Plaintiffs' expert Sidney Milkis, a professor at the University of Virginia, "the names of these [issue advertising] groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading." Milkis Decl. ¶ 49.

50. Defendants' Expert Report, produced by Professor David Magleby, finds that

> [t]he current system places an unreasonable burden on voters to ascertain who is attempting to persuade them in an election. Our focus groups and survey data from 2000 show that to voters, party and interest group electioneering advertisements are indistinguishable from candidate advertisements. (See Table 2.) Even the candidates and their campaign managers are unable to ascertain who some of the groups running ads were . . . . And in the CSED national survey, I found that respondents were often confused as to whether party ads were paid for by candidates or parties. More than 40 percent of the time, the respondents thought the party ads were paid for by a candidate . . . . Voters, when asked, have consistently indicated that they would like to know who it is that is conducting electioneering. In 2000 voters in Montana faced a competitive U.S. Senate and a competitive U.S. House race. A late October Montana State University-Billings Poll found that, "78 percent of the survey respondents reported that it was 'very' or 'somewhat important' for them to know who 'pays for or sponsors a political ad.'" Our focus group participants in 2000 had very similar views on the question of the importance of their knowing who is paying for or sponsoring an ad. More than four-fifths (81%) said it was very or somewhat important to know the identity of the sponsor. In the national Knowledge Networks Survey in 2000, 78 percent said the same thing.

David B. Magleby, *Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity*, at 29-30 [DEV 4-Tab 8].

51. The Annenberg Public Policy Center finds that

> [b]ecause issue ads are not federally regulated, sponsors are not subject to disclosure requirements. As a result, who paid for an ad may not be apparent to viewers when they see it. Some organizations do identify themselves in the course of an advertisement, but their names may be unfamiliar to viewers and/or deliberately vague. For example, "Citizens for Better Medicare" is not a grass-roots generated group of citizens, but an arm of the Pharmaceutical Research and Manufacturers Association (PhRMA).



Annenberg Report 2001 at 18; *see also id.* at 3 (commenting that "[t]racking spending on issue advocacy is far from an exact science" because of the lack of disclosure). One of the conclusions the Center has reached after seven years of study is that "[i]ssue advocacy masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility." *Id.* at 2.

52. A prominent example of an organization running advertisements that influenced a federal election but were able to skirt FECA's disclosure provisions is the "Republicans for Clean Air" campaign. The issue advocacy campaign sponsored by Republicans for Clean Air during the 2000 Republican primary highlights how groups can use candidate-centered issue advocacy to avoid FECA's disclosure requirements. Defendants' experts Krasno and Sorauf provided uncontroverted testimony that:

> [a]mong the mysterious groups sponsoring issue ads or the mysterious donors funding various organizations-all without making information known to the public-the example of "Republicans for Clean Air" stands out. This group sponsored ads praising then-Governor Bush and criticizing Senator McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign . . . . According to press estimates, the Wylys spent $25

> million on their ads for Governor Bush . . . . When the Wylys' involvement was later uncovered during the New York primary, the news qualified as a small bombshell and led to a wave of publicity critical of the brothers and the Bush campaign, which in turn distanced itself from "Republicans for Clean Air." . . . In sum, we have a major campaign conducted in secrecy during a key part of the 2000 Republican primary campaign, and a marked change in the level of scrutiny once its sponsors became known. Much as we applaud the ingenuity of the reporters who eventually broke the story, we strongly believe that there is a compelling governmental interest in making these facts known to all from the start.

Krasno and Sorauf Report at 75-76 (footnotes omitted) [DEV 1-Tab 2]; *see also* FEC MUR 4982, Statement of Reasons, Comm'rs Thomas and McDonald, April 2002, INT 003684 [DEV 133-Tab 1] ("The week before the 'Super Tuesday' primaries, a $2 million advertising campaign praising presidential candidate George W. Bush and attacking his opponent, John McCain, ran in the important primary states of California, New York, and Ohio. The ads stated that they were paid for by a group calling itself 'Republicans for Clean Air.' In actuality, the ads apparently were financed mostly by two brothers, both of whom were strong financial supporters of then Governor Bush and one of whom was an authorized fundraiser for the Bush presidential campaign. At issue in MUR 4982 was whether there should have been some disclosure to the voting public of who really paid for the ads; whether the ads were coordinated with any agent of the Bush campaign and, thus, should be viewed as an in-kind contribution to the Bush campaign, and finally, whether the advertising effort should have registered with the Federal Election Commission as a 'political committee' subject to the reporting requirements and funding restraints."). Even Plaintiffs' expert agrees that the candidate-centered issue advocacy of the Republicans for Clean Air highlights the fact



that this technique can be used to influence federal elections without complying with FECA's disclosure provisions. La Raja Decl. ¶ 25(b) ("We could not determine the sponsors of this ad until reporters in Washington discovered that brothers from Texas, who strongly supported George W. Bush, paid for the advertisements using a P.O. Box in Herndon, Virginia . . . . This direct personal experience trying to monitor outside electoral activity revealed to me the potential difficulties of identifying the source of interest group campaign activities, including issue ads.").

## IV. CONCLUSIONS OF LAW

As part of the *per curiam* opinion, the Court resolves the Paul Plaintiffs' discrete claims and most of the new disclosure provisions of BCRA.

### A. *Paul Plaintiffs' Press Clause Challenge*

Paul Plaintiffs[57] focus their complaint on the guarantees of free press embodied in the First Amendment. Paul Pls.' Br. at 8. Specifically, Paul Plaintiffs contend that BCRA imposes certain restrictions on their "press" activities, which violate the basic tenets on which the freedom of the press rests.[58] *See id.* at 10, 13-18. In doing so, Plaintiffs advance a new, if not novel, challenge—a tack that has not been used in the campaign finance realm. *See id.* at 11 ("To date, however, [campaign finance challengers] that are engaged in non-exempt press activities have not invoked the freedom of the press in their numerous challenges to the constitutionality of

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[57] "Paul Plaintiffs" include: United States Representative Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.Org, Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell.

[58] According to Paul Plaintiffs, BCRA imposes unconstitutional licensing restrictions, economically burdensome regulations, editorial control, and prior restraint on their "press" activities.

federal campaign finance regulations . . . .'').[59] While the Court recognizes the import of Paul Plaintiffs' innovative legal theory, it finds their arguments unpersuasive.

In essence, Paul Plaintiffs characterize their activities (for example, candidate press releases, broadcast and radio advertisements, and campaign literature)[60] as falling under the constitutional protections afforded to the press. The freedom of the press, as Plaintiffs contend, "was never designed as a special privilege of the institutional media," Paul Pls.' Br. at 11; rather it extends to "every freeman," *see id.* at 12 (citing *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931)). They argue further that while other First Amendment rights—of speech and association, for example—may be

[59] As discussed at oral argument:

> MR. TITUS: Now, if that's true of the institutional press, that a prior restraint has to be tested by such a high standard, all the more true for the Paul plaintiffs who in this particular case are indicating to you, Your Honors, that what they are engaged in are press activities, they are entitled to the same immunity from prior restraint as the institutional press.
>
> JUDGE LEON: Is that a novel theory?
>
> MR. TITUS: No, I don't believe it's a novel theory. I don't think it has ever been pressed.
>
> JUDGE LEON: Do you have any Supreme Court cases that support it or Circuit cases?
>
> MR. TITUS: In financial campaign law cases, no. No one has argued this claim in any campaign finance case that I know of.

Tr. at 340-41 (Titus).

[60] The vast majority of activities cited by Paul Plaintiffs fall well-outside the scope of BCRA's prohibition on "electioneering communications." *See* BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A) (not applying to press releases or campaign literature). Moreover, Paul Plaintiffs bring a facial challenge to the constitutionality of this statute, and have clearly not met their burden of demonstrating that the law is substantially overbroad.



limited by a compelling governmental interest, the freedom of the press is insulated from such limitations.[61] *Id.* at 9 n.3. Under Plaintiffs' theory, the same governmental interests that survive a constitutional challenge in *Buckley v. Valeo*, 424 U.S. 1 (1976), may not be used to justify any limitation on the general press, which includes all persons and organizations disseminating information. *See id.* at 28 ("[T]he Paul Plaintiffs urge this Court not to follow *Buckley v. Valeo* here, because the press guarantee lays down a different and more stringent standard . . . .'').

In order for Paul Plaintiffs' arguments to prevail, however, they must demonstrate that the freedom of the press provides rights superior to those under the Speech and Association Clauses of the First Amendment. If Paul Plaintiffs cannot demonstrate that their claims warrant separate and unique guarantees—guarantees that are not provided under the other

[61] Paul Plaintiffs fail to provide the Court with a standard to apply where the government obstructs "press" activities, nor do they delineate the additional, substantive rights provided under the First Amendment Freedom of the Press Clause. Plaintiffs contend that "[t]he freedom of the press provides guarantees that are distinct from, and significantly greater than, the guarantees of free speech and association, and of equal protection . . . . '' Paul Pls.' Br. at 9 n.3. Moreover, they note that "[w]hile the compelling government interest test has been applied to free speech, association, and equal protection claims, it is not applicable to the freedom of the press." *Id.* Plaintiffs do not, however, explicitly state instances where the freedom of the press has been found to be superior to the other guarantees provided under the First Amendment. Nonetheless, Paul Plaintiffs ask—although not explicitly—that the Court review any government interference with "press" activities under a more stringent standard than "exacting scrutiny," which would normally be applied where a law burdens core political speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (holding that state restrictions on political speech are subject to "exacting scrutiny"). Without guidance from the parties, the Court, therefore, assumes that Paul Plaintiffs request the application of a standard on par with strict scrutiny.

clauses of the First Amendment—then there is no need for the Court to treat their grievances separately.

The Supreme Court has not explicitly stated whether the freedom of the press affords greater protections than that of speech or association; two leading First Amendment scholars have observed, however, that the Press Clause provides no greater rights. 2 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, § 22:10 (2002) ("Does the Press Clause today have jurisdictional significance distinct from the Speech Clause? For the most part, the answer appears to be 'no.'"); *see also* Laurence H. Tribe, *American Constitutional Law* § 12-1, at 785 n.2 (2d ed. 1988).[62] Part of the problem, as Professor Smolla has observed, is that "in modern First Amendment jurisprudence, the Press Clause has largely been subsumed into the Speech Clause." *Id.* at § 22:6.

The Supreme Court's treatment of the First Amendment in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), illustrates this point. In *Bellotti*, the Supreme Court considered a Massachusetts criminal statute that prohibited corporations "from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters." *Bellotti*, 435 U.S. at 768 (internal quotations and ellipses omitted). The plaintiff-bank wanted to spend money to publicize its views on a proposed state constitutional amendment that was to be submitted to the voters as a ballot question in an upcoming election. *Id.* at 769. After being informed that the state Attorney General

[62] Professor Tribe, in his chapter on "Rights of Communication and Expression," does not allude to any greater or distinct rights afforded by the First Amendment Freedom of the Press Clause. In fact, Tribe states: "Throughout this chapter, 'freedom of speech' will be employed as shorthand for the entire collection of freedoms (other than those pertaining specifically to religion) secured from government interference by the first amendment." Laurence H. Tribe, *American Constitutional Law* § 12-1, at 785 n.2 (2d ed. 1988).



would enforce the statute, the bank sought declaratory relief. *Id.* The case was not exclusively framed around the Press Clause, *see id.* at 779, yet the Supreme Court engaged in a careful discussion of the freedom of the press and entertained whether media corporations enjoy superior rights as compared to those of general corporations. *Id.* at 781. The majority deemed that the "institutional" media "does not have a monopoly on the First Amendment," *id.* at 781-82, but went on to consider whether the state could "show[] a subordinating interest which is compelling" to justify the statute's impact on First Amendment rights, *id.* at 786. The Supreme Court then determined that the state's concern failed to meet the compelling interest test.[63] *Id.* at 788-91.

*Bellotti* is significant because, despite considering rights under the Press Clause, the Supreme Court nonetheless applied the compelling interest test. *Id.* In other words, in the context of an election law statute, as it applied to a non-media corporation, the Supreme Court treated the Press and Speech Clauses as indistinct.[64] What is more, the Supreme Court

[63] The Supreme Court distinguished the statute in *Bellotti* from traditional campaign finance laws, which involve expenditures directed towards or otherwise contributed to *candidates*. *Bellotti*, 435 U.S. at 790. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involved in candidate elections simply is not present in a popular vote on a public issue." *Id.* (citation omitted).

[64] The Supreme Court did not, however, consider whether the media exemption under most campaign finance laws, *see, e.g.*, BCRA § 201(a); FECA § 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i), violates the First Amendment or the Equal Protection Clause. That is, by exempting the "institutional" media, do such provisions unfavorably discriminate against the rights of the general press? The Supreme Court settled this question in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), when it simply stated: "Although the [institutional] press' unique societal role may not entitle the [institutional] press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Austin*, 494 U.S. at 668.

alluded to no rights under the Press Clause that are superior to or different than those under the other clauses of the First Amendment.

Even if the Court were to find that the Press Clause provides greater or different protections than the other provisions of the First Amendment, Plaintiffs' arguments must fail.[65] As noted above, Paul Plaintiffs have failed to identify any case that has applied "press" guarantees in the campaign finance context. Tr. at 341 (Titus); *see also* Paul Pls.' Br. at 11. To hold for Paul Plaintiffs would be to invite a new and wholly unsupported theory of First Amendment jurisprudence; litigants could besiege the courts with a host of challenges to laws previously upheld by the Supreme Court on First Amendment grounds, merely by characterizing themselves in their complaints as members of the "press" because their purpose is to disseminate information to the public. As Chief Justice William Rehnquist and Associate Justice Antonin Scalia observed in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), "of course, if every partisan cry of 'freedom of the press' were accepted as valid, our Constitution would be unrecognizable." *McIntyre*, 514 U.S. at 373 (Scalia, J., dissenting).[66]

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[65] If the Press Clause affords greater or different rights, it might force the courts to make a distinction between the "institutional" and "general" press. The difficulty in making this distinction compelled Chief Justice Burger to write his concurring opinion in *Bellotti*. *See Bellotti*, 435 U.S. at 796 (Burger, C.J., concurring) (noting the "difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [non-media] corporations"). Nonetheless, this Court refuses to resolve Plaintiffs' Press Clause claims in this context.

[66] In *McIntyre*, the Supreme Court applied the *Speech Clause* to invalidate an Ohio statute that prohibited the anonymous distribution of campaign literature on general, referendum questions. *McIntyre*, 514 U.S. at 336-37, 349-51. Justice Thomas concurred in judgment, but "would [have applied] . . . a different methodology to [the] case." *Id.* at 358-59. According to Justice Thomas, the "practices and beliefs held by the Founders" provided for an author's right to publish anonymously under the Press and Speech Clauses. *Id.* at 360. Justice Scalia, with whom Chief Justice Rehnquist joined, was not persuaded by Justice Thomas's arguments. *Id.* at 373. As Justice Scalia observed, "not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional, or else modern election laws such as those involved in *Buckley v. Valeo*, 424 U.S. 1 (1976) would be prohibited, as would . . . modern antinoise regulation] . . ., and modern parade permitting regulation." *Id.* (citations omitted).



Paul Plaintiffs can cite no precedent in support of their claims. Since the Supreme Court has not affirmatively provided superior rights under the Press Clause, and has suggested that such claims fall under the general First Amendment compelling interest test, this Court rejects the argument that Paul Plaintiffs' claims under the Press Clause warrant a higher level of constitutional protection.[67] Therefore, this Court will apply the same scrutiny to all First Amendment claims, whether presented under the Speech or Press Clauses, and subsumes all of Paul Plaintiffs' Title I, and essentially all of their Title II, arguments into the First Amendment challenges advanced by the other litigants in this case.[68]

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[67] Given this conclusion, the Court holds that there is no reason to remand the Paul Plaintiffs' separate challenges to FECA's pre-BCRA provisions under this theory to a single-judge court. *See* Paul Pls.' Compl. ¶ 1 ("This is an action for declaratory and injunctive relief with respect to certain provisions of [BCRA] as it amends the [FECA], *as well as certain related provisions of the FECA*] . . . on the grounds that these integrally related provisions deprive the Plaintiffs of the Freedom of the Press in violation of the First Amendment of the Constitution of the United States.") (emphasis added) (citations omitted).

[68] Paul Plaintiffs briefly challenge the constitutionality of section 301 of Title III in their pleadings—most notably and independent of their Press argument, that section 301 discriminates against non-incumbent office holders by placing limitations on personal use expenditures. Paul Pls.' Br. at 25. However, the Court is not able to discern any basis for these arguments in their Amended Complaint. Accordingly, the Court does not address this issue.

B. *BCRA's Disclosure Provisions*

*Section 201: Disclosure Provisions*

1. *Introduction*

With one exception, the Court also finds the disclosure provisions relating to "electioneering communications" constitutional. The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they should be permitted to spend corporate and labor union general treasury funds in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be "uninhibited, robust, and wide-open." McConnell Br. at 44 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Findings ¶ ¶ 44, 51, 52. Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. McConnell Br. at 44. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment



values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace. As a result, the Court finds Section 201 facially constitutional, with the exception of one subsection which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake.

2. *Discussion*

The provision's disclosure requirements are challenged by the McConnell, AFL-CIO, Chamber of Commerce, NAB, NRA, and Paul Plaintiffs. Plaintiffs' challenge to Section 201's disclosure provisions focuses on two aspects of the law: (1) its requirement of disclosure prior to the airing of electioneering communications; and (2) its requirement that disbursers disclose the names of contributors who gave over $1,000 to the disbursing fund. The Court addresses each in turn.

a. Prior Disclosure

The McConnell Plaintiffs, AFL-CIO, Chamber of Commerce, and NAM object to Section 201's disclosure requirements on the ground that they mandate disclosure of not only actually aired electioneering communications, but also contracts to make such communications. *See* McConnell Br. at 56 n.22; AFL-CIO Br. at 14-17; Chamber/NAM at 20 n.13. This advance disclosure, Plaintiffs argue, "serve[s] no governmental interest and will chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own messages." AFL-CIO Br. at 16.[69]

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[69] McConnell Plaintiffs, the Chamber of Commerce and NAM make a passing suggestion that Section 201 might constitute a "prior restraint" in

Defendants argue that the then-pending (and now final) regulations interpret the notice requirements as not mandating disclosure until after the advertisements have been publicly distributed. Gov't Opp'n at 111. The content of the regulations, argue Defendants, "moot plaintiffs' concerns, [make] plaintiffs' claims to injury . . . wholly speculative[,] and their challenge to this aspect of BCRA's disclosure provisions is therefore unfit for judicial resolution." *Id.*

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violation of the First Amendment. McConnell Plaintiffs Br. at 55-56 ("But if this Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of-and in some cases a prior restraint on- speech that the government may not regulate in the first place."); Chamber/NAM Br. at 20 n. 13 ("The timing of the BCRA's electioneering communication disclosure requirement is an unconstitutional prior restraint.").

This argument cannot be squared with the Supreme Court's definition of "prior restraint." *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) ("[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.'") (*citing Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)); *see also Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001) ("By 'prior restraint' . . . modern courts . . .mean censorship—an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive. The censor's concern is with the content of speech, and the ordinary judicial safeguards are lacking. 'Prior restraints' that do not have this character are reviewed under the much more permissive standard applicable to restrictions merely on the time, place, or manner of expression.") (citations omitted); *Wisconsin Realtors Ass'n v. Ponto*, No. 02-C-424-C, 2002 WL 31758663 * 12 (W.D. Wis. Dec. 11, 2002) (subjecting Wisconsin statute's prior reporting requirements to "time, place, or manner of expression" analysis); FEC Opp'n at 112.

Given the paucity of Plaintiffs' briefing on this matter and the precedent cited above, this Court believes further analysis of "prior restraint" in this context is not warranted.



The Court cannot agree that Plaintiffs' challenge to the disclosure requirements in Section 201 is not ripe for review. Unlike the situation confronted by the Court in examining the disclosure requirement of Section 212, discussed *infra* at 140, the regulations promulgated for Section 201 do not eliminate Plaintiffs' prior disclosure concerns. The regulations, despite the FEC's explanation of the provision,[70] appear to still require prior disclosure of electioneering communications that have not yet aired. Specifically, the definition of "disclosure date" leaves uncertain what must be disclosed after the airing of an electioneering communication when the disburser has executed contracts for electioneering communications aggregating over $10,000.[71] The regulations

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[70] In issuing the final regulations, the FEC noted that

> All of the commenters who addressed this issue . . . advocated adopting a final rule that would define "disclosure date" as the date of the public distribution of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually publicly distributed . . . .
>
> This [adopted definition of disclosure] date reflects the Commission's concerns that there are legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed, and premature disclosure may require reporting entities to divulge confidential strategic and political information about their possible future activities.

Explanation and Justification of 11 C.F.R. 104.20, Reporting Electioneering Communications, 68 Fed. Reg. at 404, 409 (Jan. 3, 2003).

[71] The regulations provide in part:

> (i) Disclosure date means: (i) The *first date* on which *an* electioneering communication is *publicly distributed* provided that the person making the electioneering communication has made one or more disbursements, *or has executed one or more contracts to make disbursements*, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

suggest that if a person has executed $10,000 in electioneering communications contracts, 24 hours after the first such communication is aired, the disburser must make a disclosure encompassing all of the electioneering communications under the contract(s). The Court notes that its jurisdiction does not extend to the FEC's BCRA regulations, *see* BCRA § 403 (providing this Court with jurisdiction to hear challenges to "the constitutionality of any provision of this Act or any amendment made by this Act"), and therefore it makes no determination on their validity or proper construction. However, given the uncertainty it finds with regard to the scope of the regulations, the Court cannot conclude that Plaintiffs' challenge is not ripe.[72] "[T]he extent of the chill upon first amendment rights induced by vague or overbroad statutes is the most significant factor in determining whether an otherwise premature or abstract facial attack . . . is ripe for decision." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384 (D.C. Cir. 1980). Where other cases have

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(ii) Any other date during the same calendar year on which *an* electioneering communication is *publicly distributed* provided that the person making the electioneering communication has made one or more disbursements, *or has executed one or more contracts to make disbursements,* for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

BCRA Reporting; Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 404, 419 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 104.20) (emphasis added).

[72] In analyzing Section 212, *infra* at 140, the Court finds that the FEC's final regulations completely and unequivocally address Plaintiffs' concerns and therefore renders their challenge to that provision unripe for adjudication at this time. In the analysis of Section 214(c), *infra* at 155, the Court finds that the regulations related to Section 214, promulgated after briefing and oral argument in this case, have affected the contours of the dispute between the parties to such an extent that the challenge is not ripe for review.



found facial First Amendment challenges ripe for review, "either the activities in which the complainants wished to (or had) engaged or the enforcing authority's particular intent to enforce the statute, or both, were clear enough to show the adversarial posture assumed by the parties and the contours of their dispute." *Id.* at 387. Here, Plaintiffs have clearly engaged in "electioneering communications" in the past, and the FEC regulations promulgated on January 3, 2003, indicate that the agency intends to enforce BCRA Section 201, including its "contracts" provision. Given these facts, the Court finds that Plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them," which threatens the danger of "self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).[73]

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[73] The Court notes that arguments could be made that the FEC's regulations do render Plaintiffs' challenge unripe. For example, under the regulations, to be an "electioneering communication" the broadcast must be "publicly distributed within 60 days before a general election." BCRA, FCC Database on Electioneering Communications; Final Rules, 67 Fed. Reg. 65190, 65210 (Oct. 23, 2002) (to be codified at 11 C.F.R. § 100.29(a)(2)). Therefore, it could be argued that a broadcast is not an "electioneering communication" until it is aired, and therefore contracts to make broadcasts are not contracts to make electioneering communications unless and until the broadcasts have been publicly disseminated.

This reasoning leads to the conclusion that one cannot have $10,000 in electioneering communications contracts to disclose until $10,000 worth of advertisements have been publicly disseminated. However, as this analysis demonstrates, such a conclusion is not unequivocally apparent, and therefore could lead to the chilling of First Amendment rights. Again, had the FEC promulgated regulations which clearly addressed this issue as it did for Section 212, the Court's ripeness determination for Section 201 would likely have been different. Given the possibility of different interpretations of the regulations, the chilling effect of that uncertainty, and the fact this Court lacks jurisdiction to rule on the regulations, the Court has determined that Plaintiffs' challenge to Section 201's disclosure provisions is ripe.

Analysis of Section 201 commences with the guidance that disclosure provisions "in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68. However, disclosure provisions are subject to exacting scrutiny analysis "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id.* at 66. The Supreme Court has found three categories of "governmental interests sufficiently important to outweigh the possibility of infringement." *Id.* The Supreme Court stated:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return . . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.



*Id.* at 66-68 (citations omitted). *Buckley* upheld the constitutionality of Section 434(e) of FECA, which required disclosure of independent expenditures, although the Supreme Court did limit the provision to only those expenditures used for "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. The provision was found to be "part of Congress' effort to achieve total disclosure . . . in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence as possible." *Id.* at 76 (footnote and quotation marks omitted). The Supreme Court deemed the measure "responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of FECA." *Id.* at 76 (footnote omitted). The Supreme Court also determined that

> it is not fatal that [section] 434(e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

*Buckley*, 424 U.S. at 81.

Addressing Plaintiffs' prior disclosure concerns, Defendant FEC maintains that even with the "contracts" language, Section 201 is constitutional because it "does not prevent anyone from speaking," and "[t]he reports themselves would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters *before* election day." FEC Opp'n at 112 (emphasis in original). Although the Court agrees that the function cited is a substantial one,

*see Buckley*, 424 U.S. at 67 ("[F]ull disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.") (citation and quotation marks omitted), the FEC does not explain how this goal is any less served by requiring disclosures only after the expenditures for electioneering communications have been publicly disseminated. Information concerning contracts that have not been performed, and may never be performed, may lead to confusion and an unclear record upon which the public will evaluate the forces operating in the political marketplace. By limiting disclosures to expenditures actually made, the government's legitimate interest is served without the constitutional and practical shortcomings implicated by requiring prior disclosures. This is so because Section 201 requires disclosure within 24 hours of the disbursement.[74]

[74] The Court does not address the question of whether or not the 24-hour disclosure deadline included in Section 201 is constitutional, as this provision was not challenged nor its constitutionality briefed by Plaintiffs and consequently not responded to by Defendants. *See* McConnell Plaintiffs Br. at 56 n.22; AFL-CIO Br. at 14-17; ACLU Br. at 17-19; Chamber/NAM Br. at 18-20; NRA Br. at 48-50; FEC Opp'n at 112 n.116 ("In *Citizens for Responsible Gov't State Political Action Comm* . . . the court invalidated a 24-hour notice requirement because it believed 'such immediate notice' was unduly burdensome- *claim [sic] not raised by plaintiffs here* . . . .") (emphasis added); *McConnell v. FEC*, No. 02-582 (D.D.C. Oct. 15, 2002) (Briefing Order) ("*All* legal arguments shall be presented on a title-by-title basis, with a discrete section of each brief devoted to each title.") (emphasis added); *see also Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 101 n.6 (D.D.C. 2001) ("The court makes no ruling on such acts, however, because the United States has not briefed the issue."); *Carter v. Cleland*, 472 F. Supp. 985, 989 n.4 (D.D.C. 1979) ("This issue was not briefed by the parties. No decision will be rendered on it."); *cf. Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("[T]his Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously."). Circuit Courts of Appeal routinely consider issues that are not briefed as "abandoned." *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (*citing Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)).



The Court finds that Section 201, by including subsection 5 of Section 201, BCRA § 201(a); FECA § 304(f)(5); 2. U.S.C. § 434(f)(5), which equates contracts to make disbursements with actual disbursements requiring disclosure of contracts to make electioneering communications prior to their public dissemination, lacks a "relevant correlation" or "substantial relation," *Buckley*, 424 U.S. at 64, to a legitimate governmental interest.

This constitutional flaw, however, does not render Section 201 unconstitutional in its entirety. BCRA provides that "[i]f any provision of this Act . . . or the application of a provi sion . . . to any person or circumstance[] is held to be unconstitutional, the remainder of this Act . . . and the application of the provisions . . . to any person or circumstance, shall not be affected by the holding." BCRA § 401; 2 U.S.C. 454 note. As the Supreme Court noted in *Buckley*, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley*, 424 U.S. at 108-09 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)); *see also Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 441 (D.C. Cir. 1982) ("The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability."), *aff'd*, 463 U.S. 1216 (1983); *Buckley*, 424 U.S. at 108-09 (finding that unconstitutional provisions did not render all of Subtitle H of FECA unconstitutional); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560- 61 (2d Cir. 1988) (finding that "the words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld . . . . [T]he invalid part

of section 223 may be dropped and . . . the remainder of the statute is fully operative."), *cert. denied*, 488 U.S. 984 (1988). Given this guidance and the clear import of Section 401 of BCRA, the Court holds that the remainder of Section 201 is severable from subsection (5). It is clear that the value of disclosing electioneering communications disbursements is not dependent on their disclosure prior to broadcast, and the Court cannot say that it is "evident that the legislature would not have enacted" the remaining disclosure provisions of Section 201 in the absence of subsection (5). *Buckley*, 424 U.S. at 108-09. The remainder of Section 201 adequately serves the purpose of "informing the public about various candidates' supporters *before* election day," FEC Opp'n at 112 (emphasis in original), without requiring advance disclosures that could potentially chill the exercise of free speech rights.

The Court therefore finds that Section 201's requirement that electioneering communications that have not yet aired but have been contracted for is unconstitutional, but that by severing subsection (5), the provision's prior disclosure concerns are remedied and the remainder of the section is constitutional.

b. Disclosure of $1,000 Contributors

Plaintiffs ACLU, Chamber of Commerce, NAM, and NRA challenge Section 201's requirement that electioneering communications disbursers disclose the names of persons who have given $1,000 or more to the disbursing fund. Plaintiffs argue that for "controversial groups, such threatened disclosure can have a deadly chilling effect on the group's advocacy." ACLU Br. at 19; *see also* Chamber/NAM Br. at 19; NRA Br. at 50. The NRA argues that the provision suffers from the same infirmities as those in FECA struck down by the D.C. Circuit, as BCRA's "disclosure requirements reach the very same outside 'groups engaging in nonpartisan discussion.'" NRA Br. at 49-50 (quoting *Buckley*,



519 F.2d at 873). Finally, the Chamber of Commerce argues that Section 201's disclosure requirements are overbroad, because at least "[w]hen the advertiser is the Chamber [of Commerce], the interest served by the ad is reasonably clear." Chamber/NAM Br. at 20 (quoting Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 Ind. L. Rev. 755, 757 (2002)).

Defendants argue that the disclosure of individual contributors is necessary because many sponsors of issue advertisements conceal "their identity from the public by electioneering pseudonymously, through front organizations such as 'The Coalition: Americans Working for Real Change,' [*sic*] 'Citizens for Reform.'" FEC Br. at 173.[75] Indeed, the Supreme Court has observed that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true

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[75] In justifying the provision, one Senator commented:

> We deter the appearance of corruption by shining sunlight on the undisclosed expenditures for sham issue advertisements. Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election. In addition our provisions will inform the voting public of who is sponsoring and paying for an electioneering communication.

147 Cong. Rec. S3034 (daily ed. Mar. 28, 2001) (Sen. James Jeffords). In a similar vein, a Representative stated:

> No one is trying to gag anybody. If they want to do a political ad that essentially wants people to vote for or against, what they say is [*sic*] fall within the independent expenditure and other provisions of the law, which has limits on what can be expended and has requirements for disclosure, which is not true of these ads that are clearly campaign ads, that are clearly political ads. But the people do not know who put the money up. They are hidden. They are endless. There is a flood of hidden, in terms of its support, of hidden money. That is what we say should not happen.

144 Cong. Rec. H4866 (daily ed. June 19, 1998) (statement of Rep. Sander Levin).

identity of the source." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (rejecting the argument that a limit on contributions to committees formed to support or oppose ballot measures was necessary "to make known the identity of supporters and opponents" of such measures, given that another provision of the ordinance "requires publication of lists of contributors in advance of the voting"). This observation has been buttressed by the evidence presented in this case. *See* Findings ¶ ¶ 48-52. For example, PhRMA, a pharmaceutical industry trade group, the Chamber of Commerce, and two brothers from Texas, have produced issue adds under the names "Citizens for Better Medicare," "Americans Working for a Real Change," and "Republicans for Clean Air," respectively. *Id.* ¶ ¶ 51, 44, 52. A recent poll showed that 61 percent of Americans want to know who is behind these issue advertisement organizations. *Id.* ¶ 46. Plaintiffs' briefs provide no evidence to the contrary and do not attempt to argue that the government lacks a legitimate interest related to the disclosure requirements; in fact, many of their experts voice the same concerns. *Id.* ¶ ¶ 49 (Milkis), 52 (La Raja). The Court finds that the evidence presented establishes that a legitimate governmental interest is served by the donors disclosure requirement, and reaffirms the *Buckley* observation that "[t] he corruption potential of [independent uncoordinated] expenditures may be significantly different [than coordinated expenditures], but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81. Without disclosure of donors, it is difficult, if not impossible for the voting public to know who is sponsoring political advertisements under amorphous and nondescript pseudonyms. *See* Findings ¶ ¶ 47, 50-51. Indeed, even those experienced in politics, political scientists, and members of the media find it difficult to know who is behind some political advertisements. *Id.* ¶ ¶ 48, 52. Without Section 201's



disclosure requirements, it will continue to be extremely difficult for the public to learn that groups, such as PhRMA, or individuals, like the Wylys, are the true source of millions of dollars in potential advertisements run under banners such as "The Coalition" or "Citizens for Better Medicare." *Id.*

This conclusion, however, does not end the inquiry. The Supreme Court has been mindful of the chilling effect disclosure can have on associational rights, and has declared that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61(1958). "The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Although disclosure requirements are often "the least restrictive means" of regulating campaign finance practices, "[i]n some instances disclosure may even expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68.

In *Buckley*, the Supreme Court considered the argument that contributions made to independent candidates and minor parties should be exempt from FECA's disclosure requirements. The Supreme Court rejected the challenge, concluding that the evidence presented was "not of the sort proffered in *NAACP v. Alabama*." [76] *Buckley*, 424 U.S. at 71.

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[76] In *NAACP*, the NAACP challenged a court order forcing the group "to reveal to the State's Attorney General the names and addresses of all of its Alabama members and agents." *NAACP v. Alabama*, 357 U.S. 449, 451 (1958). The State had obtained a restraining order, enjoined the group from operating in Alabama due to its failure to file a corporate charter with the Secretary of State. *Id.* In response, the NAACP sought to dissolve the restraining order, but refused to comply with Alabama's request for the production of documents including the NAACP's "records containing the names and addresses of *all* Alabama members and agents of the Association." *Id.* at 453 (quotation marks omitted) (emphasis added). The court then ordered the NAACP to comply. *Id.* The evidentiary record

The evidence that was presented in *Buckley* was found by the Supreme Court to be "at best . . . the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure," and therefore failed to persuade the Supreme Court that "the substantial public interest . . . outweighs the harm generally alleged." *Id. Buckley* instructs that when a legitimate government interest is served by a disclosure provision, constitutional challenges claiming the disclosure will chill associational rights must be accompanied by evidence which shows

> a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

*Buckley*, 424 U.S. at 74; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (finding Ohio

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before the Supreme Court consisted of uncontroverted evidence "showing that on past occasions revelation of the identity of [the NAACP's] rank-and-file members has exposed these member to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Based on this evidence, the Court found that

> compelled disclosure of [the NAACP's] membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which, they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."

*Id.* at 462-63. As such, the Supreme Court found that Alabama's interest in the information was insufficient to justify the disclosure. *Id.* at 466.



disclosure provisions could not be constitutionally applied to the Socialist Workers Party ("SWP") due to the "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters").[77]

For this reason, the ACLU's facial challenge to Section 201 is unavailing. Neither *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations "whose positions are often controversial and whose members and contributors frequently request assurances of anonymity" are facially unconstitutional. ACLU Opp'n at 10. Rather, as explained above, the statutes in those cases were held inapplicable to the groups in question based on the facts presented, not invalid on their face. *See NAACP*, 449 U.S. at 462- 63 ("[W]e think it apparent that compelled disclosure of *petitioner's* Alabama membership is likely to affect adversely the ability of *petitioner and its members*" to engage in their

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[77] In *Brown*, the Supreme Court examined an Ohio election campaign law which required "every candidate for political office to file a statement identifying each contributor and each recipient of a disbursement of campaign funds." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 89 (1982). The District Court in the case had found "substantial evidence of both governmental and private hostility toward and harassment of [Socialist Workers Party ("SWP")] members and supporters." *Id.* at 98-99. The evidence presented included specific incidents which took place within four years of the trial, and included "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id.* at 99. This evidence was found to present a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals. *Id.* at 100. The Supreme Court concluded that "[i]n light of the substantial evidence of past and present hostility from private persons and government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id.* at 102.

freedom to associate.") (emphasis added); *Brown*, 459 U.S. at 102 ("Ohio's campaign disclosure requirements cannot be constitutionally applied *to the Ohio SWP*.") (emphasis added). The Court is given no information as to why these donors wish to maintain their confidentiality and no indication is given that revelation of their affiliation with the group would result in harassment, threats or reprisals. Since the ACLU has presented the Court with no facts that place it in the same category of threatened associations such as the NAACP or the Socialist Workers Party ("SWP"), *see* Finding ¶ 45 [78] the Court finds no basis for invalidating the statute on its face or as applied to the ACLU based on the pre sent record.

Plaintiffs have also provided evidence regarding the effect disclosure under Section 201 would have on four other organizations. The Court considers each in turn.

The NRA provides testimony that some of its members do not wish to have their contributions to the group disclosed, and estimates that between five and 50 persons voiced their concerns in the year 2000. *Id.* ¶ 41. The group also provides testimony that a "conspicuous and disproportionate number of contributors" to its PAC contribute "justbelow the $200 disclosure level." *Id.* Although Mr. LaPierre testified that one reason given for members not wanting their contributions disclosed was fear of losing one's job, many other reasons were given as well, such as a desire not to have one's neighbors or school board know about their affiliation with the organization. *Id.* Some simply stated that they did not wish to have such information provided to the government.

[78] The ACLU provides no information as to why ACLU's donors wish to maintain their confidentiality and no indication is given that revelation of their affiliation with the group would result in harassment, threats or reprisals. As an aside, the Court notes that according to the ACLU, "[o]nly 212 individuals contributed more than $1,000 to the organization. Findings ¶ 45.



*Id.* No evidence of the basis for these fears is presented to the Court, only speculations. Nor is any evidence presented to the Court of actual instances of retaliation due to the disclosure of someone's membership in the NRA. These fears are the result of conjectures by those expressing them, but unless there is a reasonable probability that these fears will be realized as a result of disclosure, *Buckley* instructs that such worries do not overcome the state's legitimate interest in disclosure.

Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors ("ABC") and the Treasurer of ABC's PAC, testified that *he had been told* that a number of ABC contributors had suffered substantial vandalism after their names were disclosed and that the contributors *believed* the vandalism was the result of labor unions learning of their contributions. *Id.* ¶ 42. This evidence is essentially hearsay and no evidence is presented showing that the vandalism was actually retaliation in response to the disclosure as opposed to speculation on the part of contributors. Although some contributors to ABC's PAC donate less than $200, the Court has no way of knowing why they donate at this level other than Mr. Monroe's belief that it is to prevent disclosure of their names. *Id.* The same is true for the two companies that declined Mr. Monroe's solicitations. *Id.* On the basis of this evidence alone, the Court cannot find that ABC meets the *Buckley* standard.

The Court also considers evidence regarding the membership of the Associated General Contractors of America ("AGC") and the Chamber of Commerce's coalition titled "Americans Working for a Real Change." Between a dozen and two dozen AGC members expressed concern to its Chief Executive Officer, Stephen Sandherr, that if their contributions to AGC are disclosed publicly they will be subjected to union action that "would threaten to make life miserable for them." *Id.* ¶ 43. Although this testimony demonstrates that AGC members may "fear" the potential consequences of their names being disclosed in connection

with AGC, there is no evidence before the Court that these feared consequences have been, or would be, realized. Similarly, the Chamber of Commerce provides evidence that some contributors to its coalition, "Americans Working for a Real Change," did not want to be publicly identified due to fears of "what some would call union harassment activities." *Id.* ¶ 44. Once again, the Court was not presented with evidence of a reasonable basis for these fears. Furthermore, no member ever told Mr. Sandherr they were contributing $200 or less to AGC's PAC in order to avoid disclosure, and no contributor to AGC's PAC has reported union retaliation in response to their contribution to the PAC. *Id.* ¶ 43. Neither group's evidence meets the *Buckley* standard.

In sum, although many deponents relate what they believe, or have been told, were the reasons contributors did not want to have their names disclosed, that is union retaliation or employment termination, the lack of specific evidence about the basis for these concerns leaves the Court unable to findthere exists "a reasonable probability that the compelled disclosure of [any of these organizations'] contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." *Buckley*, 424 U.S. at 74. Furthermore, no Plaintiff cited to evidence, and the Court has found none, that their organization, as opposed to the organization's members or contributors, has been subjected to threats, harassment or reprisals. Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization, and thereby their membership, faces the hardships that the NAACP and SWP were found to suffer by the Supreme Court. However, nothing in this Court's decision affects the ability of groups in the future from challenging, as the NAACP and the SWP did in the past, the application of Section 201's disclosure provisions to their organization.



The Court addresses next the NRA's argument that the D.C. Circuit's invalidation of FECA's Section 437a, *Buckley*, 519 F.2d at 878, renders Section 201's requirements invalid as well. In *Buckley*, the D.C. Circuit found FECA's independent expenditure disclosure provision [79] unconstitutional. The Court of Appeals stated that "issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections . . . . [and] are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes." *Buckley*, 519 F.2d at 873. Even so, the D.C. Circuit rested its decision on the overbreadth of Section 427a's "crucial terms[:] 'purpose of influencing the outcome of an election' and 'design[] to influence' individuals in voting at an election." *Buckley*, 519 F.2d at 875. Unable to find a "readily available narrowing interpretation" of the crucial terms in light of Congress's manifested intent, *Buckley*, 519 F.2d at 877, the Court of Appeals held the section unconstitutional, *id.* at 878.

Given that the basis for the D.C. Circuit's invalidation of Section 427a rested on the provision's language and legislative history, the Court does not accept the NRA's suggestion that the Court of Appeals's decision controls this

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[79] Section 437a's "demand for disclosure is activated-without any expending of any funds whatever-(1) by any act directed to the public for the purpose of influencing the outcome of an election; or (2) by any material published or broadcast to the public which refers to a candidate (by name, description, or other reference) and which (a) advocates the election or defeat of such candidate, or (b) sets forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or (c) is otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate." *Buckley*, 529 F.2d at 870 (paraphrasing FECA § 427a) (internal punctuation and footnotes omitted).

Court's analysis of Section 201's disclosure requirements. NRA Br. at 50. Section 201 only requires disclosure of "electioneering communications," the definition of which this Court finds is constitutional. The disclosure trigger is much narrower and more definite than that of FECA Section 427a, and does not include its invalidating "crucial terms." In addition, the record before the Court clearly demonstrates that contrary to the situation facing the Court of Appeals in 1975, where "issue discussions" were indeed "unwedded to the cause of a particular candidate," the evolving present use of issue advertisements, specifically the use of "issues" to cloak supportive or negative advertisements clearly identifying a candidate for federal office, "threaten the purity of elections." *Buckley*, 519 F.2d at 873.[80] For these reasons, the Court declines to find the Court of Appeals's decision on FECA Section 427a binding on this Court's disposition of the challenges to BCRA Section 201's disclosure requirements.

Finally, the Chamber of Commerce argues that Section 201 as applied to its electioneering communications, is overbroad because the public knows that the Chamber represents the interests of American business. Chamber/NAM Br. at 20. The Court interprets the Chamber's position, encompassing all of three sentences, to mean that under BCRA it should be sufficient that the Chamber report that it is behind advertisements sponsored by, for example, "Americans Working for a Real Change" and that listing its $1,000 contributors would be unnecessary for the voting public to know the interest behind the advertisement. The Court first notes that the Chamber does not provide, and the Court

[80] For example, as mentioned above, the "group" "Republicans for Clean Air" spent $2 million the week before the "Super Tuesday primaries" in advertisements supporting presidential candidate George W. Bush and attacking his opponent John McCain. Findings ¶ 52. "Republicans for Clean Air" was actually a front for two brothers who had ties to the Bush campaign. *Id.*



cannot formulate, a disclosure rule that would take into account the notoriety of the groups involved (for example, a law that exempts "well-known" groups from disclosing the names of their $1,000 contributors, while "less well-known" groups would be required to make the disclosures). In addition, the Chamber provides no legal support for its theory, and the Court declines to consider its argument based on a record comprised of a single quotation from the Indiana Law Review and the Chamber's statement that it "is a well-known association of American businesses that has been in existence for 90 years." Chamber/NAM Br. at 20. The Court therefore rejects the Chamber of Commerce's argument.

In conclusion, the Court states what Section 201's disclosure requirements do and do not require. First, they apply only to electioneering communications, which we find constitutional. Second, Section 201 does not prevent anyone from making electioneering communications; it only requires that when persons do make such advertisements that they disclose the source of the communication's funding after they are broadcast. Lastly, the provision does not require the wholesale disclosure of all donors to the sponsoring organization, rather only donors contributing $1,000 to the disbursing account must be disclosed. Organizations are free to set up "segregated bank account[s]," funded by individuals' contributions, for electioneering communication disbursements. BCRA § 201(a); FECA § 434(f)(2)(E); 2 U.S.C. § 434(f)(2)(E). If electioneering communication disbursements made from such segregated accounts then reach the $10,000 threshold, only the names of the segregated account's $1,000 contributors will have to be disclosed. Lastly, any group can file suit to challenge the constitutionality of the *application* of Section 201's disclosure provisions to their contributors based on a showing such as "threats, harassment, or reprisals from either government officials or private parties." *Buckley*, 424 U.S. at 74.

In conclusion, the Court finds Section 201 constitutional on its face, with the exception of subsection (5), which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake because of its inclusion of future contracts for electioneering communications. For that reason, the Court severs subsection (5) and finds the remainder of Section 201 constitutional.

*Sections 202, 212, and 214* [81]

1. *Section 202*

Section 202 is challenged by the Chamber of Commerce, NAM, and the McConnell Plaintiffs. Plaintiffs' arguments with regard to Section 202 relate to those made with respect to Sections 201 and 214.[82] For example, Plaintiffs argue that the definition of "electioneering communication" is unconstitutional, and for that reason Section 202 must also be found unconstitutional. Chamber/NAM Br. at 12; McConnell Br. at 83 n.42. As this argument was addressed and rejected in this Court's examination of Section 201's definition of "electioneering communication," it is rejected here as well.

Plaintiffs also contend that "the First Amendment limits the coordination concept to express advocacy," and for that reason Section 202 should be found unconstitutional. Chamber/NAM Br. at 12. Although Plaintiffs cite to FEC Commissioner Smith for support, *id.*, this view has been

[81] Although Plaintiffs ask for judgment as to BCRA's Section 211, described *supra*, at oral argument they stated that they were not challenging the provision. *See* Tr. at 341-42 (Judge Henderson: Mr. Starr, I've got down that you all are challenging [Section] 211. Am I wrong about that? . . . . Baran: We are not challenging section 211...). Furthermore, other than a description of the provision, McConnell Br. at 82, Plaintiffs' briefs are silent on the provision.

[82] In addition, the Court observes that Plaintiffs' arguments blur Section 202's provisions with those of Sections 201 and 214, making the Court's task of discerning and addressing their arguments more difficult.



rejected by courts in this Circuit. *See Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (finding the "express advocacy" limitation "not constitutionally required for those statutory provisions limiting contributions"); *Christian Coalition*, 52 F. Supp. 2d at 86-87 & n.50 (finding the argument that "the 'express advocacy' limitation must apply to expressive coordinated expenditures" to be "untenable" in light of *Orloski* and *Buckley*).

Finally, the AFL-CIO contends that "the BCRA § 202 ban on coordinated 'electioneering communications' inevitably will criminalize efforts by the AFL-CIO to coordinate legislative public advocacy with Members of Congress, and interfere with ordinary and necessary lobbying contacts and the AFL-CIO's use of them to plan broadcast and other advocacy. For that reason alone, § 202 violates the First Amendment." AFL-CIO Br. at 14 (citing to the Declaration of Gerald M. Shea ¶ ¶ 57-59). The Court notes first that Section 202 *bans* nothing. What the Court presumes the AFL-CIO complains of is the effect of Section 202 on some entities as read in conjunction with BCRA Section 203. This issue is dealt with in this Court's examination of Section 203. The group's allegation that Section 202 will criminalize AFL-CIO contacts with Members of Congress and subsequent advocacy activities is conclusory and is asserted without any legal support. Similarly, the declaration of Gerald M. Shea, the AFL-CIO's Assistant to the President for Governmental Affairs, does nothing to help the Court discern the legal basis for its argument. Mr. Shea states that "[a]ny legal restrictions on the ability of an organization like the AFL-CIO to coordinate legislative and policy communications and activities with federal officeholders who happen to be candidates could substantially interfere with our ability to maintain ordinary and necessary working relationships with Members of Congress and their staffs." Shea Decl. ¶ 58. The fact that Mr. Shea believes that the AFL-CIO's current activities *may* be affected by Section 202 does not provide the

Court with a legal basis for invalidating the provision. Furthermore, to the extent that the AFL-CIO challenges the scope of activities covered by BCRA's definition of "coordination," the Court finds, *infra*, that such arguments are not ripe given the statutory construction of Section 214 and the recent promulgation of final regulations on coordination by the FEC.[83]

The Court therefore finds that Plaintiffs' arguments are unavailing and the Court has been presented with no basis for finding Section 202 unconstitutional.

2. *Section 212*

Section 212 is challenged by the AFL-CIO and the McConnell Plaintiffs. Plaintiffs object to Section 212 on the grounds that it requires disclosure of not only actual expenditures, but also contracts to make independent expenditures. *See* McConnell Br. at 56 n.22; AFL-CIO Br. at 14-17. This advance disclosure, Plaintiffs argue, "serve[s] no governmental interest and will chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own messages." AFL-CIO Br. at 16.[84]

A Court may not entertain a suit that is not ripe for review.

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[83] In the Court's discussion of Section 214, *infra*, it is noted that the regulations contain an explicit "safe harbor for responses to inquiries about legislative or policy issues." *See* Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 455 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(f).

[84] As they did for Section 201, McConnell Plaintiffs, the Chamber of Commerce and NAM make a passing suggestion that Section 212 might constitute a "prior restraint" in violation of the First Amendment. The Court addresses this argument in its discussion of Section 201. *See supra* note 69.



The basic rationale behind the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). Furthermore, "[t]he power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference.A hypothetical threat is not enough." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1946); *see also id.* at 90 n.22 ("It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . .'") (*citing Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945)). In situations where a statute is challenged on First Amendment grounds, the Supreme Court has found that litigants need not wait for actual enforcement if the existence of the law would chill the exercise of First Amendment rights "even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). However, in those cases, plaintiffs must "allege[] an actual and well-founded fear that the law will be enforced against them" in order to assuage the troubling aspects of "the preenforcement nature of [such] suits." *Id; see also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998) (Easterbrook, J.) (observing that if a group's concern that a law will be

enforced is not well-founded, "Article III of the Constitution precludes a federal court from ruling."), *cert. denied*, 525 U.S. 873 (1998); *Nat'l Treasury Employees Union v. Kurtz*, 600 F.2d 984, 988 (D.C. Cir. 1979) ("[E]ven where allegations of unconstitutionality on the face of a regulation are made, a concrete factual dispute is required to make the case justiciable."); *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969) ("[W]e are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy.").

The Court finds that Plaintiffs' challenge to Section 212 is not ripe for review. At the time of briefing in this case, the FEC had proposed regulations that required disclosure only *after* independent advertisements have been "publicly disseminated." These proposals were recently promulgated as final regulations. *See* BCRA Reporting; Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 404, 452 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10).[85]

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[85] The regulations provide in part:

> The person making the independent expenditures [more than 20 days before an election] aggregating $10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day *following the date on which a communication is publicly distributed or otherwise publicly disseminated* . . . .
>
> Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day *following the date on which a communication is publicly distributed or otherwise publicly disseminated*.

68 Fed. Reg. at 452 (to be codified at 11 C.F.R. § 109.10(c), (d)) (emphasis added).



This fact makes the challenge unfit for judicial resolution, as the regulations provide Plaintiffs with the exact remedy they seek: the FEC will not require disclosure of independent express advocacy expenditures prior to their "public[] disseminat[ion]." This situation presents the Court with the question Judge Easterbrook posed in *Wisconsin Right to Life*: "How can a suit present a 'case or controversy' when all the litigants are on the same side?" *Wisconsin Right to Life*, 138 F.3d at 1185.

This conclusion is bolstered by the decisions of other courts faced with similar circumstances. For example, the Seventh Circuit Court of Appeals rejected a group's claim that it had a "well-founded" fear of prosecution under Wisconsin campaign finance laws, where an advisory opinion of the Attorney General of Wisconsin and the Election Board's regulations codified the interpretation of the law the group sought. *Wisconsin Right to Life*, 138 F.3d at 1185-86; *see also Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193 (10th Cir. 2000) (describing the *Wisconsin Right to Life* holding and distinguishing the case from the one before it, which lacked "such administrative regulations"). Similarly, in *Shoemaker v. Handel*, the Third Circuit Court of Appeals upheld the lower court's determination that amended regulations, put into effect before becoming final, cured the challengers' privacy concerns, and thus made "[t]heir privacy contentions ... not ripe for adjudication." *Shoemaker v. Handel*, 795 F.2d 1136, 1144 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986). There was no need to enforce the amendments through injunctive or declaratory relief, because "[i]f the Commission cease[d] to comply with the proposed confidentiality rules, the [challengers could] return to court with a new lawsuit." *Id.*

Plaintiffs do not contest the import of the regulations. Instead, Plaintiff AFL-CIO argues that the FEC regulations do not remedy BCRA's alleged constitutional defect, as the regulations "may not be approved by Congress [,] [a]nd there is nothing to prevent the Commission itself from reversing its position as soon as this litigation is over, as part of a litigation settlement or independently." AFL-CIO Reply at 10; *see also* AFL-CIO Br. at 17 n.16 ("[G] iven the statutory text at issue plaintiffs have no assurance as to how the FEC will interpret or enforce it in the future."). These uncertainties amount to a "hypothetical threat" which the Supreme Court has stated "is not enough" to warrant judicial consideration. *United Public Workers of America*, 330 U.S. at 89-90. Should this hypothetical threat manifest itself as a "concrete factual dispute," *Nat'l Treasury Employees Union*, 600 F.2d at 988, nothing prevents Plaintiffs from "return[ing] to court with a new lawsuit," *Shoemaker*, 795 F.2d at 1144.

As Plaintiffs have presented "a controversy that has not yet arisen and may never arise," *Wisconsin Right to Life*, 138 F.3d at 1187-88, the Court lacks jurisdiction to resolve their challenge to Section 212 at this time.

3. *Section 214*

Section 214 is challenged by the McConnell Plaintiffs, the Chamber of Commerce, NAM, the RNC and the AFL-CIO. Plaintiffs' basic argument is that Section 214, "[b]y repealing the FEC's current regulation and failing to supply any clear statutory definition of what constitutes prohibited coordination, . . . will chill First Amendment speech and association." Chamber/NAM Br. at 11; *see also* ACLU Br. at 19-20; AFL-CIO Br. at 13 ("BCRA's vague and overbroad coordination standards will inevitably spur . . . wide-ranging and burdensome investigations" by the FEC.). Plaintiffs also charge that the directive of Section 214(c) that "'agreement or formal collaboration' not be a prerequisite to considering an expenditure 'coordinated,' . . . exceeds the constitutional



bounds established in *Buckley*." McConnell Br. at 83; *see also* Chamber/NAM Opp'n at 8; RNC Br. at 72 (Section 214 "can only be understood as an impermissible effort to overrule this court's decision in *FEC v. Christian Coalition* . . . which warned against overbroad definitions of 'coordination.'"). The Chamber of Commerce and NAM, in their Opposition brief, argue that Section 214(a)(2), by classifying coordinated expenditures with parties as contributions, will "chill both party contacts, and contacts with legislators," and that Section 214(d) expands the definition of what may constitute a coordinated contribution or expenditure. Chamber/NAM Opp'n at 8.[86]

a. Section 214(a)

Under Section 214(a)(2), expenditures by a person, other than a candidate or a candidate's authorized committee, made in "cooperation, consultation, or concert with, or at the request or suggestion of, a national, State or local committee of a political party," are considered to be contributions to those party committees. BCRA § 214(a)(2); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii).[87] As noted *supra*, this same definition has been applied to expenditures coordinated with political candidates for over 25 years and was recently found by the Supreme Court to apply to political

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[86] The Court notes at this juncture that Plaintiffs' Section 214 arguments, especially those involving Defendants' justiciability arguments, were sparse and in many instances difficult to discern. Although the Court understands that the page limitations imposed on the parties may have been a contributing factor, the lack of clarity has made the Court's task more difficult.

[87] For the sake of clarity, the Court points out that contrary to Plaintiffs' description, Section 214(a) does not establish a "ban" on coordination, Chamber/NAM at 8, or a "year round prohibition on all communications made by a corporation," ACLU Br. at 20. Section 214(a) classifies such contacts as contributions, but does not prevent coordination from taking place.

party expenditures. *See* 2 U.S.C. § 441(a)(7)(B)(i); *Colorado II*, 533 U.S. at 467.

Plaintiffs argue that the definition of coordination in Section 214(a) is "unconstitutionally vague." McConnell Br. at 85 n.44. This lack of precision, Plaintiffs allege, violates the First Amendment's "demand[] that the conduct that constitutes coordination be precisely, objectively, and narrowly defined," and leaves citizens unsure of what contact they may have with political parties without having future speech regulated as "coordinated." Chamber/NAM at 12. Plaintiffs discount the fact that BCRA orders the promulgation of clarifying regulations because regulations are "subject to the ebb and flow of administrative practice," and speakers "will thus be forced to 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Id.* (quoting *Buckley*, 424 U.S. at 41 n.48).[88] Finally, Plaintiffs maintain that the existence of an

[88] The Chamber of Commerce and NAM also allege that regulations cannot save Section 214(a)

> for four key reasons: (i) some unconstitutional aspects such as its inclusion of 'electioneering communication' are clearly mandated and are beyond the FEC's power to change; (ii) the vagueness as to what conduct may constitute coordination, and hence make future speech unlawful, is chilling association and petitioning activities right now; and[sic] (iii) there is no assurance that the FEC will be able to agree on new regulations at all, [sic] and (iv) there is no assurance that any regulations that may be adopted will survive Congressional and judicial review.

Chamber/NAM Br. at 13. These arguments can be disposed of with expedition. First, the Court does not understand how Section 214(a), on its face, includes "electioneering communication" and Plaintiffs have not explained their statement. Second, alleged chilling of rights incurred prior to the promulgation of the FEC's regulations, as well as the uncertainty over whether the FEC would be able to agree on new regulations, are rendered moot by the promulgation of the final regulations in early January 2003. FECA also provides protection for those who act in good faith reliance on FEC regulations. *See* 2 U.S.C. § 438(e). Finally, the



"agreement" is a constitutional prerequisite to finding an expenditure to be "coordinated" with political parties.[89] The Court analyzes each concern in turn.

1) Vagueness

As the Court noted above, the campaign finance system has been functioning for over 25 years despite the presence of the very same "vague" language to which Plaintiffs object. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Plaintiffs have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates. Furthermore, the Court notes that the FEC's regulations have now been promulgated in final form. It is therefore possible that many, perhaps even all, of Plaintiffs' vagueness concerns have been remedied by the regulations' contents. *See* Chamber/NAM Br. at 13 (stating that while the FEC's now-repealed regulations on coordination "did not solve all the vagueness problems, it took useful steps toward alleviating them").[90] Although

possibility that the regulations may be struck down by Congress or a court is the type of speculative injury that does not rise to the level of a present case or controversy required for Article III standing. *See infra* at 155.

[89] Although Plaintiffs have not directed this argument specifically at Section 214(a) (it is directed more explicitly at Section 214(c)), it is a central theme of the McConnell Plaintiffs' briefing and the Court presumes that they intend for it to be applied to Section 214(a) as well.

[90] The regulations promulgated by the FEC define coordinated communications as those not paid for by the candidate or the political party, that meet one content and one conduct standard. Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21). The conduct standards include: (1) communications made, produced, or distributed at the request or suggestion of the candidate or party, or at the request or suggestion of a payor who receives the candidate or party's assent; (2) material involvement by the candidate or party in decisions regarding the content, intended audience, means or mode, media outlet used, the timing or

Plaintiffs discount the value of such regulations because of the "ebb and flow of administrative practice," they provide no support for their theory that laws restricting speech cannot be shaped by regulations because of the nature of administrative practices. In addition, as described in more detail below, *see infra* at 167, any issues arising from the enforcement of these regulations can be challenged via lawsuit under the Administrative Procedure Act (APA), or clarified through the advisory opinion procedure codified at 2 U.S.C. § 437f.[91]

2) Agreement

The Court addresses next Plaintiffs' argument that Section 214(a) violates the Constitution because it does not require the existence of an "agreement" as a predicate to the finding of coordination. Plaintiffs cite to four cases in support of their theory that an agreement is required for an expenditure to be coordinated. The Court addresses each in turn, finding that none support Plaintiffs' argument.

In *Buckley*, the Supreme Court found that Congress could

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frequency, or the size or prominence of the communication; (3) one or more substantial discussions about the communication between the payor and the candidate clearly identified in the communication which concern the candidate's or political party committee's campaign plans, projects, activities, or needs that are material to the creation, production or distribution of the communication. *Id.* at 454. The regulation also creates a safe harbor for responses to inquiries about legislative or policy issues. *Id.* at 455. The content standards can be found at 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(c)).

[91] The statute provides in part:

> *Not later than 60 days* after the Commission receives from a person a complete written request concerning the application of [FECA] . . . or a rule or regulation prescribed by the [FEC], with respect to a specific transaction or activity by the person, the [FEC] *shall* render a written advisory opinion relating to such transaction or activity to the person.

2 U.S.C. § 437f(a)(1) (emphasis added).



limit coordinated expenditures to "prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. In rejecting FECA's limitation on independent expenditures, the Supreme Court distinguished independent from coordinated expenditures, noting that expenditures "made *totally* independently of the candidate and his campaign . . . . may well provide little assistance to the candidate's campaign and indeed may prove counter-productive." *Id.* (emphasis added). The Supreme Court noted that "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. The coordinated expenditure provision *Buckley* upheld defined coordinated expenditures as those "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate." *Id.* at 47 n.53 (quoting FECA § 608(c)(2)(B)). The Supreme Court cited to the House and Senate reports, especially the more detailed Senate report which included the following "example illustrating the distinction between 'authorized or requested' expenditures . . . and independent expenditures":

> "(A) person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's (sic) that would constitute an 'independent expenditure on behalf of a candidate' under section 614(c) of the bill. The person making the expenditure would have to report it as such.
>
> "However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as if there had been a direct contribution enabling the candidate to place

> the advertisement himself. It would be so reported by both."

*Id.* (quoting S.Rep. No. 93- 689, p. 18 (1974), U.S. Code Cong. & Admin. News 1974, p. 5604) (alteration in original). Based on this guidance, the Supreme Court found that "the 'authorized or requested' standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions." *Id.*

In *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) ( "*Colorado I*"), the Supreme Court found that an advertisement made by a political party was not a coordinated expenditure, in part because of "uncontroverted evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." *Colorado I*, 518 U.S. at 614 (plurality opinion) ("[W]e therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution.").

This District Court grappled with the troublesome First Amendment line between coordinated and independent expenditures in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). In her decision, which was not subjected to appellate review, Judge Joyce Hens Green explained:

> This Court is bound by both the result and the reasoning of *Buckley*, even when they point in different directions. While Buckley confidently assured that coordinated expenditures fell within the Act's limits on contributions, it also reasoned that spending money on one's own political speech is an act entitled to constitutional protection of the highest order. Expressive coordinated expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender. I take from *Buckley* and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.



*Christian Coalition*, 52 F. Supp. 2d at 91 (citations omitted). In addressing "coordination as it applies to expressive coordinated expenditures by corporations," *id.*, Judge Green noted that "[t]he fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." *Id.* at 92. However, the absence of such overtures would not, in Judge Green's view, prevent an expenditure from being coordinated.

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. This standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

*Id.* Judge Green acknowledged that this standard still left "room for factual dispute," which in turn could "chill some speech." *Id.* But such deficiencies were deemed acceptable given that "expressive coordinated expenditures present real dangers to the integrity of the electoral process." *Id.*

In *Colorado II*, the Supreme Court expounded on the difficulty in determining the point at which an expenditure becomes a coordinated expenditure. The Supreme Court also commented on the functional approach which Congress had adopted, and the *Buckley* Court accepted, to balance First Amendment rights and the state's interest in preventing campaign finance corruption.

The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. But facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify. As already seen, Congress drew a functional, not a formal, line between contributions and expenditures when it provided that coordinated expenditures by individuals and nonparty groups are subject to the Act's contribution limits, 2 U.S.C. § 441a(a)(7)(B)(i). In *Buckley*, the Court acknowledged Congress's functional classification, and observed that treating coordinated expenditures as contributions "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and



nonparty groups), as defined to include coordinated expenditures.

*Colorado II*, 533 U.S. at 442-443 (citations omitted). Also, in that case, the Supreme Court found that "coordinated spending . . . covers a spectrum of activity." *Id.* at 445.

This Court agrees that "First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association." *Christian Coalition*, 52 F. Supp. 2d at 91. However, the Court finds nothing in the cited precedent, or Plaintiffs' arguments, demanding that for an expenditure to be coordinated there must be an agreement. The Court's reading of these cases suggests the very opposite. At the very least, the cases state that substantive requests and suggestions, or "wink or nod" arrangements, can render subsequent expenditures to be "coordinated," a standard that does not equate to agreement.[92] Therefore, the Court rejects the argument that agreements are a constitutional prerequisite to the finding that an expenditure is coordinated, and finds that Plaintiffs have not demonstrated that Section 214(a) violates the Constitution.

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[92] Defendants offered this hypothetical to illustrate the type of coordination the "request or suggestion" standard is intended to cover:

> A candidate suggests to a wealthy individual, "If you want to help, you might finance some political advertisements advocating my election"; the individual does not reply, but a week later, buys $100,000 worth of air time to advocate the candidate's election.

Gov't Br. at 185. According to the Chamber of Commerce, this hypothetical "is realistic . . . . Candidates and their parties routinely make general requests for public support." Chamber/NAM Opp'n at 6.

b. Section 214(b)

Section 214(b) repealed the FEC regulations on coordination in effect at the time BCRA was enacted. BCRA § 214(b). Plaintiffs concede that Congress has the power to repeal the regulations. What Plaintiffs argue, however, is that "Congress had a duty to provide a narrow, precise, and objective definition for the coordination concept" but failed to do so and "by repealing the FEC's regulatory definition, Congress substantially aggravated the constitutional violation." Chamber/NAM Br. at 13 n. 6. Since the FEC promulgated regulations on January 3, 2003, this "aggravation" claim is moot.

c. Section 214(c)

Because Defendants argue that Plaintiffs' challenge to Section 214(c) is nonjusticiable, Gov't Br. at 183-85; Int. Br. at 139-40, the Court will address this issue first as its resolution may preclude consideration of the merits of the Plaintiffs' other arguments. Preliminarily, the Court notes that BCRA provides this Court with jurisdiction to hear "any action brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act," and instructs it to "expedite to the greatest possible extent the disposition of the action." BCRA § 403; 2 U.S.C. § 437h note. This grant does not extend to the consideration of FEC regulations, and it does not permit the Court to go beyond its Article III powers to address claims that are nonjusticiable. *Clark v. Valeo*, 559 F.2d 642, 650 n. 11 (D.C. Cir. 1977) ("To the extent [the dissent's] language may be read as suggesting a view that Congress may 'command' the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed 'for its own governance in the cases confessedly within its jurisdiction,' we respectfully disagree.") (citations omitted). Cognizant of its authority, the Court now turns to each of Defendants' justiciability claims.



1) Article III Standing

Plaintiffs have the burden of establishing standing to bring their suit by demonstrating that they have: (1) suffered an "injury in fact;" (2) which is "fairly traceable to the conduct complained of;" and (3) is capable of judicial redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In the First Amendment context, the standing requirements are somewhat relaxed. Parties have

> standing to challenge a statute on grounds that it is facially overbroad, regardless of whether [their] own conduct could be regulated by a more narrowly drawn statute, because of the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> Of course, in order to have standing, an individual must present more than allegations of a subjective chill. There must be a claim of specific present objective harm or a threat of specific future harm.

*Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975) (citation and internal quotation marks omitted).

In terms of the "injury in fact" prong, it is true that Plaintiffs have "not alleged any concrete and particularized injury from [Section] 214(c)'s instructions to the Commission to promulgate a new regulation." Gov't Br. at 184. However, *Bigelow* instructs that Plaintiffs do not have to allege a particularized injury, they must only show a specific objective harm. *Bigelow*, 421 U.S. at 816-17. Plaintiffs allege that the Constitution requires an agreement before an expenditure may be considered coordinated. McConnell Br. at 84; Chamber/NAM Opp'n at 8 n. 10 (stating that Section 214(c) "fairly read, rejects the constitutional holding" that the "First Amendment demanded a narrow agreement standard of coordination"). The fact that Section 214(c) directs that the

FEC's regulations on coordination not require "agreement or formal collaboration," from Plaintiffs' perspective, presents a specific future-harm of impermissibly overbroad regulations. McConnell Opp'n at 53 n.24 (arguing that "since" no constitutional regulation consistent with BCRA can be promulgated (because of the statute's disavowal of an 'agreement' standard)" it would be futile to delay "litigation until regulations are promulgated, litigation is appropriate now").[93] This argument was addressed above and found to be inconsistent with the holdings of *Buckley* and its progeny.[94]

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[93] Plaintiffs, despite purporting to have standing to challenge Section 214(c), have not clearly articulated the basis for their position. This theory represents what the Court has gleaned from their terse briefings. *See* Chamber/NAM Opp'n at 7-8; Chamber/NAM Reply at 7-10; McConnell Opp'n at 53 ("For reasons discussed fully in the submission of the Chamber of Commerce Plaintiffs . . . this assertion [that plaintiffs' coordination arguments are not justiciable at this time] are meritless.").

[94] McConnell Plaintiffs argue that the language of Section 214(c) violates the Constitution because it does not require "*some form of agreement* with the candidate [to] be present to find coordination. BCRA, of course, forbids the FEC from requiring that any sort of agreement - *formal or otherwise* - be required." McConnell Opp'n at 54 n.26. The Court disagrees with Plaintiffs, interpreting Section 214(c) under the doctrine of *noscitur a sociis*. "The maxim noscitur a sociis, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jareki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Given that "agreement" in Section 214(c) is immediately followed by the words "or formal collaboration," narrows the Court's reading of the term to cover formal agreements. This interpretation also appears to match the intent of Congress. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (Sen. Russ Feingold) ("Unfortunately, based on a single district court decision, the Federal Election Commission's current regulation defining when general public political communications funded by outside groups are considered coordinated with candidates or parties fails to account for certain types of coordination that may well occur in real-world campaigns. The FEC regulation is premised on a very narrowly defined concept of 'collaboration or agreement' between outside groups and candidates or



Therefore, Plaintiffs' allegation that they will be injured by regulations which by Congressional direction will be constitutionally overbroad, is not an injury-in-fact.[95]

Even if this Court were to find that Plaintiffs have alleged an injury-in- fact, Plaintiffs would still lack standing to bring their Section 214(c) challenge because their claim lacks redressability. To establish standing, Plaintiffs are required to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Even if this Court were to strike Section 214(c) from BCRA, other provisions dealing with coordinated expenditures to candidates and parties

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parties. This current FEC regulation fails to cover a range of *de facto* and *informal* coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill.").

[95] The AFL-CIO, the Chamber of Commerce and NAM assert that "BCRA's vague and overbroad coordination standards will inevitably spur more . . . wide-ranging and burdensome investigations." AFL-CIO Br. at 13; Chamber/NAM at 14 ("[T]he Chamber and NAM[] know from painful, first-hand experience how a vague and overbroad concept of 'coordination' permits unfounded charges and investigations that seriously burden and chill participation in legislative initiatives.") These Plaintiffs point to the FEC's investigations into their broadcasts made in 1995 and 1996 (the Chamber of Commerce's advertisements were run in response to those aired by the AFL- CIO) to support this proposition. The Court finds a harm that may be caused by potential future investigations to be the type of speculative injury *Lujan* rejects as a basis for standing. Furthermore, the Court notes that the regulatory regime under which these investigations were conducted was far broader than that which BCRA appears to endorse. *See Christian Coalition*, 52 F. Supp. 2d at 89-91 (rejecting the FEC's "insider trading" or "conspiracy" standard for coordination). The regulations in place prior to 2000 considered expenditures to be coordinated when they were "[m]ade by *or through* any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent." 11 C.F.R. § 109.1(b)(4)(i)(B) (1999 ed.) (*repealed* 2001) (emphasis added).

would still govern and count contributions as any expenditures made at the request or suggestion of a candidate-covering behavior which falls short of formal collaboration or agreement. *See* 2 U.S.C. § 441a(a)(7)(B)(i), (ii). As the Court explained above in finding Section 214(a) constitutional, there is nothing inherently unconstitutional about the "cooperation, consultation, or concert with, or at the request or suggestion of" language found in FECA § 441(a)(7)(B)(i) or (ii), 2 U.S.C. § 441(a)(7)(B)(i), (ii). There-fore, Plaintiffs' challenge to Section 214(c) cannot redress their claimed injury of having coordination defined as something broader than an agreement.

Based on the foregoing, the Court concludes that Plaintiffs have failed to establish the injury in fact and redressability elements required for Article III standing with regard to their challenge to Section 214(c).

2) Ripeness

In the alternative, the Court examines Defendants' assertion that Plaintiffs' Section 214(c) claims are not ripe for judicial review at this time. Defendants maintain that since Section 214(c) does not require or prohibit any actions by Plaintiffs, but merely directs the FEC to promulgate new regulations which were not final until after briefing and oral arguments in this case were completed, "neither the Court nor plaintiffs can know how the revised regulations will affect plaintiffs or have any basis for evaluating whether those regulations will contravene constitutional principles." Gov't. Br. at 183-84; *see also* Int. Br. at 140 ("[T]here is nothingmeaningful for this Court to review . . . until there is actually a new definition in place."). This defect, Defendants argue, renders Plaintiffs' claims not yet ripe.

It is presumed that "federal courts lack jurisdiction unless the contrary appears affirmatively from the record," and "[i]t is the responsibility of the complainant clearly to allege facts



demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 315 (1991). In commencing the ripeness analysis, the Eighth Circuit provides guidance:

> In order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy. Ripeness is peculiarly a question of timing, intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form . . . .
>
> [The] ripeness inquiry in the context of this [First Amendment] facial challenge . . . focuses on three elements: (1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review. Our ripeness inquiry is not to be applied mechanically but rather, with flexibility.
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> *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499-1500 (10th Cir. 1995) (citations and quotation marks omitted).

Plaintiffs' arguments focus on the first two prongs of the ripeness analysis. They allege that Section 214 creates a situation whereby it is unclear what actions may render an expenditure "coordinated" under BCRA. This predicament, Plaintiffs claim, chills their speech and associational rights, which is the direct and immediate hardship they assert. *See* Chamber/NAM Opp'n at 10. Since BCRA is "self-enforcing," in that "it can be used against people in its current form," Plaintiffs maintain that the case is fit for judicial review. Tr. at 296 (Baran).

In light of the authority presented by the D.C. Circuit, the Court disagrees with Plaintiffs and finds their challenge to Section 214(c) not ripe for review. In *Martin Tractor Co. v. FEC*, a number of parties sought declaratory and injunctive relief from certain provisions of FECA. *Martin Tractor Co. v. FEC*, 627 F.2d 375, 377 (D.C. Cir.), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980). Limited to "soliciting" its hourly employees twice a year, the Martin Tractor Company complained that Section 441b(b)(4)(B) of FECA had restricted, in a constitutionally impermissible manner, its ability to communicate with its hourly employees about its PAC. *Id.* at 382. Neither the statute nor the regulations defined "solicit" or "solicitation." *Id.* at 383. The Court of Appeals determined, despite the vagueness of the undefined term "solicit" and the lack of clarifying regulatory language, that "the extent of the chill induced by the statutory provision at issue . . . is a very limited one." *Id.* at 384. This conclusion was based on two factors. First, the statute provided an "advisory opinion (AO) mechanism . . . authorized to give advice concerning the Act's application to specific factual situations," and mandated that such counsel be provided within 60 days of a request for advice. *Id.* 384-86. Second, the D.C. Circuit found that the legal rights alleged by Martin Tractor were "uncertain," *id.* at 386, and that unlike cases which had found ripeness in similar circumstances, the "adversarial posture assumed by the parties and contours of their dispute" were not clear, *id.* at 387. Specifically, the fact that the FEC "has said or done nothing . . . to indicate how it construes the term 'solicit,'" left the court "without substantial guidance to decide this case or even to frame the constitutional issues at stake." *Id.* at 387.

The situation this Court faces is virtually identical to that of *Martin Tractor*. Plaintiffs here similarly complain about the chilling effect of an ambiguous term. Plaintiffs, like those in *Martin Tractor*, have the option of seeking a chill-reducing AO if they fear their actions may be construed as



"coordination."[96] In addition, since briefing and oral argument in the case occurred prior to the FEC's promulgation of final regulations and the regulations affect the vagueness alleged, the Court does not know the "contours of [the] dispute." In other words, the Court does not know to what extent the regulations have clarified the vagueness Plaintiffs contend would chill their rights. Regulations in the past have clarified this very issue, Chamber/NAM Br. at 13

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[96] Plaintiffs' argument that *Buckley* should be construed as rejecting the opportunity for AO guidance as a factor in determining ripeness is completely incorrect, and in their own words, is "[n]onsense." Chamber/NAM Reply at 8. *Buckley* found that since the AO procedure in FECA *at that time* was available *only* to "candidates, federal officeholders, and political committees," the AO mechanism did "not assure that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future years." *Buckley*, 424 U.S. at 41 n. 47. This is no longer the case. *See Martin Tractor*, 627 F.2d at 386 n.44 (explaining why *Buckley* rejected the AO rationale and noting that "[b]oth of these aspects of the AO mechanism have been amended and the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced.").

Section 437f of FECA requires the FEC to provide an advisory opinion within 60 days of receiving a "written request concerning the application of [FECA] ... or a rule or regulation prescribed by the" FEC. 2 U.S.C. § 437f(a)(1). The advisory opinions may be relied upon by the requester or any other person involved in an "identical transaction or activity with respect to which such advisory opinion is rendered." *Id.* at § 437f(c)(1). Such persons who "act[] in good faith in accordance with the provisions and findings of such advisory opinion, shall not, as a result of any such act, be subject to any sanction provided by" FECA. *Id.* § 437f(c)(2).

Plaintiffs also assert that it is "wildly implausible" and "impractical" to believe that the FEC could handle the thousands of AO requests they envision would result from the Court's decision today. Chamber/NAM Reply at 8. Whether or not there would be such an influx of requests, and whether or not the FEC would be in a position to handle them, are not questions before this Court and Plaintiffs have provided the Court with no basis, other than their unsupported assertion, for finding that the AO mechanism would be unworkable for solving coordination problems.

(stating that the FEC's now-repealed regulations on coordination "took useful steps toward alleviating" vagueness problems), and it is therefore likely that some, if not all, of Plaintiffs concerns have been addressed. For example, the ACLU maintains that because of Section 214 it "may not be able to discuss a . . . vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes the official's stand. This feature of BCRA acts as a continuing prior restraint . . . ." ACLU Br. at 20. However, the FEC's recently promulgated regulations appear to assuage this fear, creating a safe harbor for "inquiries about legislative or policy issues." Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. at 455 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(f)). To decide Plaintiffs' claims at this juncture would entangle the Court in a dispute that has not been "presented in a clean-cut and concrete form," the exact situation the ripeness doctrine is designed to avoid. *Gonzales,* 64 F.3d at 1499.

The Chamber of Commerce and NAM seek to distinguish *Martin Tractor* from the current case on its facts. Chamber/NAM Reply at 8. First, they state that "[p] laintiff there did not claim immediate injury." *Id.* This is not the case. Martin Tractor alleged that "but for the [section] 441b restrictions and the threat of sanctions, [it] would resume the extent and manner of communication [it] engaged in previously." *Martin Tractor,* 627 F.2d at 382. Second, Plaintiffs presume, based on the fact the court stated that the AO mechanism "argues against constitutional adjudication on a barren record," *Id.* at 385, that the appellants in that case had "provided no factual record." Chamber/NAM Reply at 8. If the Plaintiffs had referred to the footnote immediately following the court's statement, they would have seen that the court meant a record bare of any indication of how the FEC planned to enforce the provision, as opposed to a barren factual record. *See Martin Tractor,* 627 F.2d at 385 n.39 (citing cases holding "equitable relief inappropriate where



administrative intent has not come to fruition or is unknown" and "case ripe where pertinent regulations *and AO* have been issued") (emphasis added). Next, the Chamber of Commerce and NAM appear to suggest that the *Martin Tractor* decision was the product of prudential concerns, and not an Article III ripeness determination. Chamber/NAM Reply at 8. Although the court stated, "we find the cases nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter," if Plaintiffs had looked at the footnote immediately following that statement, they would have read the Court's conclusion that "[s]ince we hold that these appellants present no justiciable 'case or controversy' we need not decide or consider the circumstances under which a court might decline for prudential reasons alone to reach the merits of a constitutional challenge to FECA." *Martin Tractor,* 627 F.2d at 378 & n.5. Lastly, the Chamber of Commerce and NAM point out that *Martin Tractor* discounted *Buckley*'s ripeness holding for "lack of a broad package of expedited challenges such as exist here." Chamber/NAM Reply at 8. The *Martin Tractor* court did note that the case before it provided "no similar urgency of decision . . . that outweighs the inadvisability of premature constitutional adjudication," although its decision was also informed by "the comparative speed with which an advisory opinion on specific conduct can be secured." *Martin Tractor,* 627 F.2d at 388.[97]

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[97] The Court also notes that although the *Martin Tractor* court took *Buckley*'s statement that "ripeness is peculiarly a question of timing," *Buckley,* 424 U.S. at 114, to describe the timing of that case in relation to the 1976 Presidential election, *Martin Tractor,* 627 F.2d at 388, a close reading of *Buckley* shows that the Supreme Court was referring to developments that had taken place in "the passage of months between the time of the decision of the Court of Appeals and our present ruling," *Buckley,* 424 U.S. at 114. The Supreme Court made its ripeness determination in the context of a separation of powers challenge to FECA's establishment of the FEC. *Id.* at 113. The Court finds that the challenge considered here differs greatly from that *Buckley* faced when it conducted the ripeness analysis described above. The separation of

Accordingly, the Court finds that *Martin Tractor* is applicable to the pending cases.

The cases at bar do differ from *Martin Tractor,* in one material respect. Unlike the case before the *Martin Tractor* court, where there was no indication the FEC would ever promulgate regulations to reduce the vagueness of the undefined term, Congress in this instance has explicitly ordered the FEC to promulgate regulations on this very matter in an expedited fashion, and the FEC did so on January 3, 2003. This fact argues against finding these cases ripe for adjudication. As the Eighth Circuit explained,

> [m]any ripeness cases require finality of the government action that is challenged. This requirement is intended, in part, to guard against courts passing on the legality of actions that do not, in and of themselves, alter or burden the rights, duties or obligations of the claimant. For example, orders that merely embody a precursor to the later formulation of actual regulations will, as a general rule, not support a finding of ripeness.

*Gonzales,* 64 F.3d at 1504 n.5 (citations omitted) (finding that, unlike the cases presented here, since the "challenged provision itself delineates the proscribed conduct and neither directs nor requires further administrative or legislative enactments for its effect" the case was ripe for adjudication); *see also El Dia v. Hernandez Colon,* 963 F.2d 488, 496 (1st Cir. 1992) (finding the "policies that underscore the ripeness doctrine militate strongly against granting discretionary

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powers concerns raised in *Buckley* did not depend on the future promulgation of regulations, but focused solely on the constitutionality of the powers granted to the FEC. *See id.* at 113. The *Buckley* defendants could not claim that future regulations would shape the contours of the plaintiffs' claims. As such, this Court finds that the *Buckley* ripeness determination was made under circumstances that distinguish it from the case at bar and that its reasoning does not require the Court to forego Article III justiciability requirements in this case.



(declaratory) relief" where the executive order challenged was "merely a precursor to the later formulation of actual regulations"). Moreover, as long as Plaintiffs abide by the regulations in good faith, they will not be subject to sanctions under FECA. 2 U.S.C. § 438(e) ("[A]ny person who relies upon a rule or regulation proscribed by the [FEC] . . . and who acts in good faith in accordance with such rule or regulation, shall not, as a result of such act, be subject to any sanction provided by [FECA].").

The Court acknowledges that the regulations may still be vetoed by Congress [98] or face a court challenge. Regardless, the regulations shape the "contours" of Plaintiffs' complaints regarding Section 214(c). However, since the regulations are not properly before this Court, Plaintiffs' claims in this regard are not ripe. Again, it is possible that many, perhaps all, of Plaintiffs' concerns have been remedied by the recently promulgated regulations. The proper venue for any complaints Plaintiffs believe have not been addressed by the new regulations is not this special court, but in a single-judge court pursuant to a lawsuit brought under the Administrative Procedure Act (APA). *See* BCRA § 403. Although Plaintiffs decry the lengthy nature of suits brought under the APA, the Court lacks the jurisdiction to rule on the regulations and

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[98] Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), the FEC's regulations must be submitted to Congress and do not take effect until 60 days after Congress receives the FEC's report on the regulations or the rule is published in the Federal Register, whichever is later. 5 U.S.C. § 801(a)(3). The regulations were transmitted to Congress on December 18, 2002 and published in the Federal Register on January 3, 2003. Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Congress can veto the regulations within 60 days by passing a joint resolution disapproving the regulations. *See* 5 U.S.C. § 802.

cannot ignore the absence of Article III ripeness in order to provide Plaintiffs with the forum they prefer.[99]

Accordingly, the Court does not reach the merits of Plaintiffs' challenges to Section 214(c), as they are not ripe for adjudication.

d. Section 214(d)

In their Opposition Brief, the Chamber of Commerce and NAM claim that Section 214(d)

> specifies that coordination applies not only to a "contribution or expenditure" in the defined sense that requires express advocacy, but "*also* includes any direct or indirect payment . . . ." (emphasis added). BCRA § 214(d) extends coordination to an "electioneering communication." These provisions remove express advocacy as a *content* standard and give no substitute.

Chamber/NAM Opp'n at 8 (emphasis in original). The Court does not find Section 214(d) to have the effect on FECA that Plaintiffs assert. Section 214(d) amends FECA Section 441b, which limits contributions or expenditures by national banks, corporations, or labor organizations, so that the definition of "contribution or expenditure" under that section "includes a contribution or expenditure, as those terms are defined in section 301" of FECA, 2 U.S.C.

[99] Plaintiffs should also be aware that should they challenge the FEC's regulations, they may seek a stay from the FEC or a court to prevent the application of the rule pending its review. 5 U.S.C. § 705. The law provides: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." *Id.*



§ 431(8), (9). BCRA § 214(d); FECA § 441b(b)(2); 2 U.S.C. § 441b(b)(2). The definitions of"contribution" and "expenditure" in FECA Section 301 have not been amended by BCRA.[100] Plaintiffs' complaints about the definition's inclusion of "direct or indirect payment" are also misplaced as this provision preexisted BCRA and is therefore not subject to this Court's review.

Given the fact that Plaintiffs' understanding of Section 214(d) is mistaken, the Court has no basis upon which to review the provision, cannot fathom the nature of their claims, and therefore does not find the provision unconstitutional.

C. *BCRA Title III*

*Section 311: Clarity Standards for Identification of Sponsors of Election- Related Advertising*

Section 311 amends Section 318 of FECA, 2 U.S.C. 441d, adding details and requirements for the identification of sponsors of political advertising. Included in the provision is the extension of FECA's requirements to electioneering communications, as defined in BCRA Section 201. BCRA § 311(1); FECA § 318(a); 2 U.S.C. § 441d(a). Pursuant to Section 318 of FECA, such communications must clearly state information about the sponsor, 2 U.S.C. § 441d(a); Section 311 adds various requirements related to the identification of the sponsor in the communication itself which are not challenged in the present litigation. *See* BCRA § 311(2), FECA § 318(c)-(d); 2 U.S.C. § 441d(c)-(d).

[100] BCRA Section 203 adds "electioneering communication" to FECA Section 441b(b)(2)'s definition of "contribution or expenditure."

Plaintiffs' briefing on Section 311 is limited to a single sentence in a footnote in the McConnell Plaintiffs' Opening Brief:

> BCRA's requirement that political ads contain information identifying the candidate supported by the communication,[101] the party responsible for the content of the information, and/or an indication that the candidate approves the content of the communication . . . is . . . invalid, at least when applied to electioneering communications (and, for that matter, anything other than express advocacy).

McConnell Pls.' Br. at 56 n.22; *see also* Tr. at 303 (Baran).[102] This argument is presented as a corollary to Plaintiffs' contention that "if the Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of . . . speech that the government may not regulate in the first place. *Id.* at 55-56. Given that the Court finds BCRA's electioneering communication definition constitutional, Plaintiffs' argument is rejected.

## V. CONCLUSION

Accordingly, the Court finds that the Paul Plaintiffs' challenge is without merit. The Court finds that the disclosure

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[101] It is not clear to the Court where the Plaintiffs find this purported requirement from the text of Section 311.

[102] JUDGE HENDERSON: . . . Jumping to 311, only because I think this is the last time we're going to hear from the omnibus [Plaintiffs], and I think you all are the only ones challenging 311, and it's not down here to be argued in Title 3 and I just want to make sure that it has been challenged . . . .

MR. BARAN: I'd have to rely on the briefs on that, Your Honor. I'm not in a position to address that today.

TR. at 303 (Baran).



requirements in Section 201, with one exception, are constitutional, as well as Sections 202, 214(a), 214(d) and 311. The Court concludes that a challenge to Sections 212 and the remainder of Section 214 is not justiciable.

In contrast with Judge Henderson's characterization of our approach, we believe that the resolution of these eleven suits required a careful and judicious review of all the evidence, pleadings, and arguments in a fair manner to all the parties. We are satisfied that we accomplished this goal in an as expedited a manner as possible and thereby served "the strong public interest in election law clarity and stability." Henderson Op. at 6 n.1.

Three separate opinions by the members of this three-judge panel follow this *per curiam* opinion. Given the complexity of the rulings, and the fact that not any one opinion is fully dispositive, the opinions are presented in order of seniority of the members of this three-judge panel. Accordingly, Judge Henderson's opinion appears first, followed by Judge Kollar-Kotelly's opinion and then Judge Leon's opinion.

"To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas."

—Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

HENDERSON, *Circuit Judge*, concurring in the judgment in part and dissenting in part.

I believe the statute before us is unconstitutional in virtually all of its particulars; it breaks faith with the fundamental principle—understood by our nation's Founding Generation, inscribed in the First Amendment and repeatedly reaffirmed by the United States Supreme Court—that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). My colleagues' *per curiam* opinion and their other opinions ignore the statute's transparent infirmity and leave standing its most pernicious provisions, apparently on the ground that candidate-focused political speech inevitably "corrupts" the individuals to whom it refers. Their reasoning and conclusions treat a First Amendment with which I am not familiar. *See Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) ("[T]he prospect that voters might be persuaded by . . . endorsements is not a *corruption* of the democratic political process; it *is* the democratic political process." (emphasis in original)). Further, the opinions are similarly flawed in their dissection of the statute's dense and interlocking provisions, upholding a portion here and striking down a fragment there until they have drafted legislation the Congress would never have enacted—all in the name of *deference* to that body. *See, e.g.*, Per Curiam Op. at Part I; Memo Op., RJL, at Parts I.A.2, I.A.3, I.B, II.C.[1]

[1] To the extent this opinion overlaps with or is non-responsive to the other opinions, the disconnect is necessitated by the statute's mandate that we "advance on the docket and . . . expedite to the greatest possible extent the disposition of the action[s]." BCRA § 403(a)(4); FECA § 310 note; 2 U.S.C. § 437h note.



In light of that mandate, the panel held a status hearing on April 23, 2002—now over one year ago—at which the court and the parties discussed expedition and the significance of the statute's delayed effective date. *Compare* Status Hearing Tr. at 23, 39, 82 (counsel for plaintiffs suggesting parties "ought to do our best" to "put[ ] this court in a position where, if it can, it can resolve everything by the effective date of the statute"), *with id.* at 58-61 (counsel for defendants disagreeing with "assumption . . . that section 403, the expedition section, requires some type of decision by this court by November 6th [of 2002]"); *see also id.* at 61 (court stating "I read [the statute] to mean that they want it to happen before [November 6th]" (Henderson, J.)). At that time, the parties differed somewhat as to the latest date on which the Supreme Court could receive the case and still decide it during the Court's October 2002 Term. *Compare, e.g., id.* at 60, 69-70, 73-74 (counsel for government and intervenors proposing that "this court . . . resolve all the issues by early February" so that "the Supreme Court of the United States could in the ordinary course resolve this [case] by the end of the 2002 [T]erm"), *with id.* at 76, 82 (counsel for plaintiffs suggesting "the schedule that is being proposed by the government does place an extraordinary burden on the Supreme Court" and that "things should be done before November 6th if at all possible"); *see also id.* at 60 (court stating "[t]hat's putting an awful lot on the Supreme Court to decide this if we don't hear it until February. . . . As far as I'm concerned, I'd rather put the burden somewhere [other than on the Supreme Court] [as] an inferior court." (Henderson, J.)). All agreed, however, that the Supreme Court had to receive the case no later than the first week of February. *See id.* at 23, 39-40, 58, 60, 69- 71, 73-74, 82.

On April 24, 2002 the panel issued a scheduling order setting out a discovery and "paper trial" timetable that fixed an argument date of December 4, 2002. During the next eight months—a necessarily-compressed discovery and trial period—the parties conducted extensive discovery and submitted an "elephantine" record, Oral Arg. Tr. Vol. 1, Afternoon Session, at 152 (counsel for Senator McConnell), an impressive achievement due in no small measure to their extraordinary efforts to keep delay to a minimum. At the oral argument held on December 4 and 5, the parties again gave their estimates of the latest date on which an appeal could reach the Supreme Court in time for a final decision by June 30, 2003. Again there was consensus that the Court had to receive the case no later than early February. *See* Oral Arg. Tr. Vol. 1, Morning Session, at 19 (counsel for Senator McConnell stating "it would be very helpful to the [C]ourt" if district court issued its judgment "as of the end of January or as soon into February as possible"); *id.*, Afternoon Session, at 277-78 (counsel for intervenors stating Court could hear the case "in the regular

course of briefing" if district court issued its judgment during "the third week in January"); *see also id.*, Morning Session, at 19 ("I estimated actually less [time] than that, but, all right." (Henderson, J.)).

The panel's subsequent delay in resolving these actions has not only defied the statute's expedition mandate but, regrettably, has ill-served the strong public interest in election law clarity and stability. In my view, the delay could have been avoided--as it was avoided in *Buckley v. Valeo*—by the Congress's lodging judicial review of constitutional questions in an *en banc* court of appeals instead of a three-judge district court. By contrast to BCRA section 403, which provides for judicial review "by a 3-judge court convened pursuant to section 2284 of title 28, United States Code," BCRA § 403(a)(1); FECA § 310 note; 2 U.S.C. § 437h note, FECA's judicial review provision provided--and still provides--that the Federal Election Commission, any national political party committee or any eligible voter "may institute such actions in the appropriate district court of the United States . . . as may be appropriate to construe the constitutionality of any provision of [FECA]" and that such court "immediately shall certify all questions of constitutionality of [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting *en banc*," 2 U.S.C. § 437h. Pursuant to 2 U.S.C. § 437h, and noting a comment of the provision's sponsor that "it is in the interest of everyone" to have "serious question[s] as to the constitutionality of this legislation . . . determined by the Supreme Court at the earliest possible time," *Buckley v. Valeo*, 387 F. Supp. 135, 139 (D.D.C. 1975) (quoting 120 CONG. REC. S5707 (daily ed. April 10, 1974) (statement of Sen. Buckley)), *remanded by Buckley v. Valeo*, 519 F.2d 817 (D.C. Cir. 1975), the district court in *Buckley* certified 28 such questions to the *en banc* D.C. Circuit, *see Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). The D.C. Circuit, in turn, resolved the questions—which were no less novel than the ones the panel decides today—two months after oral argument. *See Buckley*, 519 F.2d at 821. A similarly swift resolution here would have yielded a decision by the first week of February.

That the *Buckley en banc* panel consisted of eight members, not three—and that it did not have, as we have had, the benefit of a statutorily-prescribed eight-month stay in the effective date of the legislation—did not prevent it from issuing a decision more expeditiously than has this panel. Although the actions before us have produced a large (but probably unnecessary) record, *see infra* pages 64-65, we have decided the constitutional questions presented in the same manner as the *Buckley* panel did—after briefing and oral argument and in lieu of a full-blown



On March 27, 2002—after nearly seven years of congressional wrangling—the President signed into law the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA) (codified at 2 U.S.C. §§ 431 *et seq.*),[2] which amends and supplements the Federal Election Campaign Act of 1971 (FECA or Act), Pub. L. No. 92-225, 86 Stat. 3 (1971 Provisions) (codified as amended at 2 U.S.C. §§ 431 *et seq.*). Among BCRA's most significant and controversial features are provisions: prohibiting any corporation or labor organization from making a disbursement for any "electioneering communication," BCRA § 203, which is defined as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . [and which] is made within . . . 60 days before a general, special, or runoff election . . . or . . . 30 days before a primary or preference election . . . for the office sought by the candidate," *id.* § 201; requiring any person who "makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" to file certain disclosures with the Federal Election Commission (FEC or Commission), *id.;* limiting the source and amount of disbursements that are "coordinated" with a federal candidate or a national, state or local political party committee, *id.* §§ 202, 214; severely restricting any national, state or local political party committee and its agents from soliciting, receiving or transferring non-federal (i.e., "soft money") funds, which are not subject to FECA's source-and-

trial. While both the district court and the circuit court have their strengths, the circuit court is more familiar with, and far better equipped to handle, the briefing-and-argument mode of judicial decision-making than is the trial court—as the excessive prolongation of these actions manifests. The Congress would do well to leave 28 U.S.C. § 2284 out of any future amendment to FECA. *See also infra* note 55.

[2] A full copy of the statute is available online at http:// www.fec.gov/pages/bcra/major_resources_bcra.htm.

amount limitations and reporting requirements but are subject to state regulation, *see id.* § 101; and prohibiting any individual who is 17 years old or younger from making any contribution whatsoever to any candidate for federal office or any contribution or donation to any political party committee, *see id.* § 318. The Congress enacted these and other innovations in response to perceived regulatory gaps in the Act. By many popular accounts, a "soft money loophole" had allowed corporations, unions, wealthy individuals and political parties themselves to distort the political process in violation of the spirit, if not the letter, of the Act. 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold); *see* Gov't Br. at 3 (contending "soft money loophole has grown from a narrow exception to FECA's limitations into a huge and ever-growing means of circumventing" them). More troubling, according to BCRA's proponents, was that corporations and unions had used vast portions of their treasury funds—and political parties had used a large percentage of their non-federal funds—to pay for campaign advertisements that steered clear of FECA's limits only by "masquerading" as ads about issues of public concern. *E.g., Regarding the First Amendment and Restrictions on Issue Advocacy: Hearings Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 105th Cong. (1997) (statement of Donald J. Simon), *available at* http://www.house.gov/judiciary/22343.htm; *see* Intervenors Br. at 72 ("The parties spent much of [the] soft money on broadcast advertising that supposedly addressed only 'issues,' but in fact was designed to influence the election of candidates for federal office." (citing Mann Expert Report at 18-26)).

As soon as BCRA was signed into law, Senator Mitch McConnell and the National Rifle Association (NRA) filed separate suits in this court challenging the statute's constitutionality. Since then, nine additional complaints have been filed and a total of 75 additional plaintiffs have joined



Senator McConnell and the NRA in challenging the validity of the new law.[3] The plaintiffs pray for relief in the form of

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[3] As of the May 7, 2002 deadline for amendment of pleadings, intervention or joinder of additional parties and consolidation of additional cases, *see* Scheduling Order of 4/24/02, 84 plaintiffs were parties to the consolidated actions. Since then seven plaintiffs—the Alabama Republican Executive Committee, Martin J. Connors, the Jefferson County Republican Executive Committee, the Christian Coalition of America, Inc., the Libertarian Party of Illinois, Inc., the DuPage Political Action Council, Inc. and the National Association of Wholesaler-Distributors--have been dismissed from the suit without prejudice. *See generally* Orders of 8/15/02, 9/13/02, 9/18/02 and 9/30/02 Dismissing Pls. Without Prejudice.

Remaining in the suit are 77 plaintiffs in 11 actions: in No. 02-CV-0582 are Senator McConnell, former Representative Bob Barr, Representative Mike Pence, Alabama Attorney General Bill Pryor, the Libertarian National Committee, Inc. (LNC), the American Civil Liberties Union (ACLU), Associated Builders and Contractors, Inc. (ABCI), Associated Builders and Contractors Political Action Committee (ABC PAC), the Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., the National Right to Life Committee, Inc. (NRLC), National Right to Life Educational Trust Fund (NRL ETF), National Right to Life Political Action Committee (NRL PAC), the National Right to Work Committee, 60 Plus Association, Inc., the Southeastern Legal Foundation, Inc., U.S. d/b/a ProEnglish, Thomas McInerney, Barret Austin O'Brock and Trevor M. Southerland (collectively, the *McConnell* plaintiffs); in No. 02-CV-0581 are the NRA and the National Rifle Association Political Victory Fund (NRA PVF) (collectively, the *NRA* plaintiffs); in No. 02-CV-0633 are Emily Echols, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid and Zachary C. White (collectively, the *Echols* plaintiffs); in No. 02-CV-0751 are the Chamber of Commerce of the United States (Chamber of Commerce), the National Association of Manufacturers (NAM) and U.S. Chamber Political Action Committee (collectively, the *Chamber of Commerce* plaintiffs); in No. 02-CV-0753 is the National Association of Broadcasters (NAB); in No. 02-CV- 0754 are the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the AFL-CIO Committee on Political Education Political Contributions Committee (COPE PCC) (collectively, the *AFL-CIO* plaintiffs); in No. 02-CV-0781 are Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America

(1) an order and judgment declaring the challenged provisions of BCRA unconstitutional; (2) an order and judgment permanently enjoining the defendants [4] and their agents from enforcing, executing or otherwise applying the challenged provisions; (3) costs and attorneys' fees pursuant to any applicable statute or authority; and (4) any other relief the court in its discretion deems just and appropriate. *See, e.g.*, McConnell Second Am. Compl. (McConnell Compl.) at 51.

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Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud and Carla Howell (collectively, the *Paul* plaintiffs): in No. 02-CV-0874 are the Republican National Committee (RNC), Mike Duncan, the Republican Party of Colorado, the Republican Party of Ohio, the Republican Party of New Mexico and the Dallas County (Iowa) Republican County Central Committee (collectively, the *RNC* plaintiffs); in No. 02-CV- 0875 are the California Democratic Party (CDP), Art Torres, the Yolo County Democratic Central Committee, the California Republican Party (CRP), Shawn Steel, Timothy J. Morgan, Barbara Alby, the Santa Cruz County Republican Central Committee and Douglas R. Boyd, Sr. (collectively, the *CDP* plaintiffs); in No. 02-CV-0877 are Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, the California Public Interest Research Group, the Massachusetts Public Interest Research Group, the New Jersey Public Interest Research Group, the United States Public Interest Research Group, the Fannie Lou Hamer Project and the Association of Community Organizers for Reform Now (collectively, the *Adams* plaintiffs); and in No. 02-CV-0881 are Representative Bennie G. Thompson and Representative Earl F. Hilliard (collectively, the *Thompson* plaintiffs).

[4] The defendants in these consolidated actions are the FEC; the United States of America (United States); the United States Department of Justice (DOJ); the Federal Communications Commission (FCC); John Ashcroft, in his official capacity as Attorney General of the United States of America; Ellen L. Weintraub, Bradley A. Smith, David M. Mason, Danny L. McDonald, Scott E. Thomas and Michael E. Toner, in their official capacities as Commissioners of the FEC; and Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (collectively, the intervenors), as intervening defendants.



In my view, all of the challenged provisions except the one discussed in Part IV.D.4 (which I believe must be sustained) and those discussed in Parts IV.F and IV.G (as to which I would pass no judgment [5]) are unconstitutional. Accordingly, and for the reasons stated*infra* in Parts III and IV of this opinion, I would (1) declare that BCRA sections 201, 202, 203, 204, 212, 213, 214, 311, 318 and 504 violate the First Amendment to the United States Constitution; (2) declare that new FECA sections 301(20), 323(a), 323(b), 323(c), 323(d) and 323(f)—as added by BCRA section 101—violate the First Amendment to the United States Constitution; (3) permanently enjoin the defendants and their agents from enforcing, executing or otherwise applying BCRA sections 201, 202, 203, 204, 212, 213, 214, 311, 318 and 504; and (4) permanently enjoin the defendants and their agents from enforcing, executing or otherwise applying new FECA sections 301(20), 323(a), 323(b), 323(c), 323(d) and 323(f), as added by BCRA section 101.

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[5] I believe that no plaintiff who challenges BCRA section 305 has standing to do so. *See infra* Part IV.F. Likewise, I am convinced that no plaintiff has standing to challenge the increased contribution limits set out in BCRA sections 304, 307, 316 and 319. *See infra* Part IV.G. Therefore, I would not decide the constitutionality of those provisions even though upon examination of the record and despite BCRA's severability provision, *see* BCRA § 401, I doubt that the Congress, upon elimination of the numerous provisions I believe are invalid, would have been "satisfied" with the contribution limit increases. *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 235 (1932) (severability clause "discloses an intention to make [a statute] divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained"); *see Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part) ("To invoke a severability clause to salvage parts of a comprehensive, integrated statutory scheme . . . exalts a formula at the expense of the broad objectives of Congress.").

This opinion begins with a factual recitation divided into two Parts.[6] Part I provides a history of congressional efforts to regulate campaign finance and discusses the Supreme Court's seminal decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the jurisprudential starting point of my analysis. Part II describes BCRA's interwoven provisions; it details the ways in which BCRA changes the existing regulatory scheme and it catalogues the constitutional bases upon which the plaintiffs in these consolidated actions challenge the new statute. With that foundation established, Part III addresses *in limine* matters including, most importantly, the findings of fact that I would make (in lieu of those of the majority) and the standards of review that guide my substantive analyses. Part IV then addresses the myriad constitutional questions raised by the new law. Part V provides a brief conclusion. Given the complexity of the undertaking, the number of issues to be addressed, the plain need for clarity and the length of this opinion, I provide a table of contents on the following pages.

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Table of Contents

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I. A Brief History of Campaign Finance Regulation

Although federal campaign finance legislation dates back at least to the late nineteenth century,[7] federal campaign

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[6] In the interest of rendering an opinion that reads as a coherent whole—and, again, for the sake of expedition—I have retained introductory sections that overlap (but only somewhat) with scattered portions of the *per curiam* opinion. *Compare infra* Part I *with* Per Curiam Op. at Part II.A; *compare also infra* Part II *with* Per Curiam Op. at Part II.B.

[7] *See Ex parte Curtis*, 106 U.S. 371, 375 (1882) (upholding constitutionality of Act of Aug. 15, 1876, 19 Stat. 169, which prohibited non-appointed federal employees from requesting or receiving anything of value for political purposes); *see also id.* at 376-77 (Bradley, J., dissenting) (voting to strike down statute on First Amendment grounds because "deny[ing] to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs").



contributing and spending were not heavily regulated until the 1970s. In 1971, following an expensive 1968 presidential election, the Congress enacted FECA, which relied upon public disclosure of campaign contributions[8] and expenditures[9] as the primary method of identifying and weeding out political *quid pro quos*.[10] *See* 1971 Provisions §§ 301-311;

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[8] Under FECA, the term "contribution" includes

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431(8)(A); *see also id.* § 431(8)(B) (exemptions from definition of "contribution").

[9] Under FECA, the term "expenditure" includes

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. § 431(9)(A); *see also id.* § 431(9)(B) (exemptions from definition of "expenditure").

[10] Previous disclosure requirements, which FECA replaced entirely, can be found in the Act of June 25, 1910, 36 Stat. 822, *see United States v. UAW*, 352 U.S. 567, 575 (1957) (describing how 1910 Act "translated popular demand for . . . curbs upon the political power of wealth into a publicity law that required [political] committees . . . to report all contributions and disbursements and to identify contributors and recipients of substantial sums"), and in the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, *see Burroughs v. United States*, 290 U.S. 534, 540-42, 545 (1934) (upholding requirement that political committees accepting

*see also ACLU v. Jennings*, 366 F. Supp. 1041, 1054 & nn.18-20 (D.D.C. 1973) (three-judge court) (describing FECA's Title III, which "establishe[d] an elaborate system of record keeping and public disclosure of campaign contributions and expenditures"), *vacated as moot sub nom., Staats v. ACLU*, 422 U.S. 1030 (1975). By 1974 many legislators who were not content to rely exclusively on a "disclosure-centered regime" to prevent corruption called for tighter campaign finance restrictions. Joel M. Gora, "*No Law . . . Abridging*," 24 HARV. J.L. & PUB. POL'Y 841, 856-57 (2001) ("Even though not all of the abuses that we put under the rubric of 'Watergate' involved illegal or questionable campaign funding, Watergate seemed to have become at least in part a poster child for campaign finance excess and corruption."). The resulting amendments to FECA, *see* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974 Amendments) (codified as amended at 2 U.S.C. §§ 431 *et seq.*), included several innovations warranting a detailed recitation here.

The 1974 Amendments prohibited any person [11] from contributing more than $1,000 per election [12]—and any political committee[13] from contributing more than $5,000 per elec-

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contributions or making expenditures "for the purpose of influencing" presidential and vice-presidential elections report totals donated and spent as well as names of donors contributing $100 or more).

[11] FECA defines "person" broadly to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11).

[12] An "election" is, statutorily speaking, a "general, special, primary, or runoff election," a "convention or caucus of a political party which has authority to nominate a candidate," a "primary election held for the selection of delegates to a national nominating convention of a political party" or a "primary election held for the expression of a preference for the nomination of individuals for election to the office of President." 2 U.S.C. § 431(1).

[13] In order to qualify for the higher contribution ceiling as a "political committee," an entity (that would otherwise be a "person" subject to the



tion—to any one candidate [14] for federal office. *See* 1974 Amendments § 101. They also barred any person from contributing more than an aggregate of $25,000 to all recipients per election cycle. *See id.*

In addition, the 1974 Amendments sharply curtailed the amount of money that could be *spent* for the purpose of influencing any election for federal office. For instance, they prohibited any person from spending more than $1,000 "relative to a clearly identified candidate" during any calendar year. *Id.* They precluded any candidate from spending more than a given amount of personal funds—$50,000 in the case of a presidential or vicepresidential candidate, $35,000 in the case of a senatorial candidate and $25,000 in the case of any other congressional candidate[15]—"in connection with his campaigns during any calendar year." *Id.* And they placed restrictions on overall campaign spending by candidates: a presidential candidate could spend a maximum of

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lower limit) must register with the FEC and meet certain statutory requirements. *See* 2 U.S.C. § 433; *see also infra* note 17 (defining "political committee").

[14] Under FECA, the term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

> (A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or
>
> (B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

2 U.S.C. § 431(2).

[15] Under the 1974 Amendments, a candidate for the office of Representative from a State entitled to only one Representative was permitted to spend up to $35,000 in personal funds.

$10,000,000 in seeking nomination for office and a maximum of an additional $20,000,000 in the general election campaign; in any senatorial primary election, a candidate was limited to spending either $100,000 or eight cents times the relevant voting-age population, whichever was greater; in the general election, a senatorial candidate could spend either $150,000 or 12 cents times the relevant population, whichever was greater; in both the primary campaign and the general election campaign for the House of Representatives, the limit was $70,000.[16] *See id.*

Finally, the 1974 Amendments expanded the disclosure and reporting requirements of the 1971 Provisions. *See id.* §§ 201-209. Together with the earlier provisions, the 1974 Amendments mandated, *inter alia*, that each political committee[17]: register with the FEC, *see id.* §§ 208-209; keep detailed records of both contributions and expenditures, *see* 1971 Provisions §§ 302-304, 1974 Amendments §§ 202-204;

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[16] The senatorial ceilings applied to those candidates seeking nomination or election to the office of Representative from a State entitled to only one Representative.

[17] Under FECA, a "political committee" is

> (A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or
>
> (B) any separate segregated fund established under the provisions of section 441b(b) of this title; or
>
> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure . . . aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. § 431(4); *see also Jennings*, 366 F. Supp. at 1054 (explaining how "[c]ategorization as a political committee sets into motion certain detailed disclosure and reporting requirements").



include in its records the name and address of anyone who made any contribution in excess of $10,[18] together with the date and amount of the contribution, *see* 1971 Provisions § 302, 1974 Amendments § 202; and include as well the occupation, employer and/or principal place of business of anyone contributing more than $100[19] during any calendar year, *see* 1971 Provisions § 302, 1974 Amendments § 202. The disclosure provisions also required each candidate to file with the FEC quarterly reports containing detailed financial information, including the full name, mailing address, occupation and principal place of business of each person contributing more than $100[20] during any calendar year, as well as the amount and date of the contributions. *See* 1971 Provisions § 304, 1974 Amendments § 204. Further, the provisions required the Commission to make the reports "available for public inspection . . . and copying." 1971 Provisions § 311, 1974 Amendments § 208. Finally, they mandated that any individual or group (other than a political committee) making independent expenditures of over $100[21] during any calendar year file a statement to that effect with the Commission. *See* 1974 Amendments § 204.

A diverse group of plaintiffs—including United States Senator James L. Buckley, who was seeking re-election, a candidate for the presidency of the United States, a potential contributor, the Committee for a Constitutional Presidency, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party and the

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[18] The figure has been raised and is currently $50. *See* 2 U.S.C. § 432(c)(2).

[19] The figure has been raised and is currently $200. *See* 2 U.S.C. § 432(c)(3); *see also id.* § 431(13).

[20] The figure has been raised and is currently $200. *See* 2 U.S.C. § 434(b)(3).

[21] The figure has been raised and is currently $250. *See* 2 U.S.C. § 434(c)(1).

New York Civil Liberties Union—challenged FECA's provisions on a variety of constitutional grounds, spawning the massive and now-legendary litigation known as *Buckley v. Valeo*. What follows is a synopsis of the United States Supreme Court's decision in *Buckley*.[22]

Although the *Buckley* Court recognized that monetary contributions to candidates and political committees play an "important role . . . in financing political campaigns," *Buckley*, 424 U.S. at 21, that contribution limitations "implicate fundamental First Amendment interests," *id.* at 23, and that such limitations "could have a severe impact on political dialogue if [they] prevented candidates and political committees from amassing the resources necessary for effective advocacy," *id.* at 21, it upheld all three of the Act's major contribution limits because there was "no indication" that they would have "any dramatic adverse affect on the funding of campaigns," *id.* More specifically, the Court rejected free speech and equal protection challenges to the provision barring any person from contributing more than $1,000 per election to any one candidate. *See id.* at 23-35. "[U]nder the rigorous standard of review established by our prior decisions," the Court held, "the weighty interests served by restricting the size of financial contributions to political candidates"—namely, "limit[ing] the actuality and appearance" of *quid pro quo* corruption of federal candidates and officeholders—"are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id.* at 26, 29. It upheld as well the provision prohibiting any political committee from contributing more than $5,000 per election to any one candidate, *see id.* at 35-36, concluding that it "serve[s] the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees," *id.* And it sustained the provision prohibiting any person from contributing more than $25,000 in the aggregate per election cycle, *see id.* at 38, holding that "this quite modest restraint upon protected political activity" likewise "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party," *id.*

[22] The legal framework laid out by *Buckley* and its progeny is discussed in greater detail *infra* in Part IV.



The Court found, however, that in contrast to the Act's contribution restrictions, the limits on expenditures "impose[d] direct and substantial restraints on the quantity of political speech." *Id.* at 39; *see id.* at 19-20 (expenditure ceilings "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication" (footnotes omitted)). Rejecting the notion that "the dependence of a communication on the expenditure of money operates itself to . . . reduce the exacting scrutiny required by the First Amendment," *id.* at 16, the Court held that

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media

> for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

*Id.* at 19; *see id.* at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").[23] Addressing first the $1,000 limit on any person's expenditure "relative to a clearly identified candidate," the Court observed that no provision of the Act lent potential spenders (and, therefore, speakers) any interpretive aid in discerning what "relative to" might mean. *Id.* at 41. Because the use of such an "indefinite phrase" failed to "clearly mark the boundary between permissible and impermissible speech," *id.*, offered "no security for free discussion," *id.* at 43 (quotation omitted), "blanket[ed] with uncertainty whatever may be said," *id.* (quotation omitted), and would "compel[] the speaker to hedge and trim," *id.* (quotation omitted), the Court—in order to preserve the provision from invalidation—construed it to apply only to expenditures "for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44; *see id.* at 44 n.52 ("This construction would restrict the application of [the provision] to communications containing express words of advocacy of election or defeat, such as 'vote

[23] *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (*Shrink Missouri*) (Breyer, J., concurring) (even "a decision to *contribute* money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech." (emphasis altered)); *id.* at 416 n.4 (Thomas, J., dissenting) ("[T]he First Amendment protects the right to pay others to help get a message out."); *but see id.* at 398 (Stevens, J., concurring) ("Money is property; it is not speech.").



for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"). Even so construed, however, the provision failed the Court's scrutiny:

> [T]he governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the $1,000] ceiling on independent expenditures. . . . The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. . . . [Moreover, the ceiling] heavily burdens core First Amendment expression. . . . Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

*Id.* at 45-48; *see id.* at 39-51. For similar reasons, the other expenditure restrictions under review failed the First Amendment test as well. The limit on a candidate's spending of personal resources was not justified given that: (1) "[t]he candidate, no less than any other person, has a . . . right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates," *id.* at 52; and (2) "the use of personal funds *reduces* the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's . . . limitations are directed," *id.* at 53 (emphasis added); *see id.* at 51-54. Likewise infirm were the limits on overall candidate campaign spending—which, the government stressed, were designed to reduce allegedly "skyrocketing" costs of campaigns, *id.* at 57—

because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise," *id.*; *see id.* at 54-59.

Finally, although the *Buckley* Court recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *id.* at 64 (citing, *inter alia*, *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958)), it upheld the Act's numerous disclosure and reporting requirements, *see id.* at 60-84, concluding that they vindicated three governmental interests "sufficiently important" to outweigh their infringement of First Amendment freedoms:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the [Act's] contribution limitations . . . .

*Id.* at 66-68 (quoting, *inter alia*, LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.")). Specifically, the Court sustained the disclosure provisions against the plaintiffs' contentions that they were overbroad both in their application to minor-party and



independent candidates and in their extension to *de minimis* contributions, *see id.* at 68-74, 82-84; the Court found that "any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors" was "highly speculative," *id.* at 70. Not without apparent misgivings, it also sustained the provision requiring any individual or group (other than a political committee or candidate) making expenditures of over $100 during any calendar year (other than by contributions to political committees or candidates) to file a statement with the FEC. *See id.* at 74-82. The plaintiffs had contended that the provision would impose "very real, practical burdens . . . certain to deter individuals from making expenditures for their independent political speech." *Id.* at 75. Noting that the Act's definition of "expenditure" spoke in terms of funds used "for the purpose of . . . influencing" the nomination or election of any candidate for federal office, *id.* at 77, the Court recognized that the $100 disclosure provision could indeed have a drastic chilling effect on protected speech in the form of campaign spending, *see id.* at 76-77. Thus, in order to steer the provision clear of the "shoals of vagueness," *id.* at 78, and "[t]o insure that [its] reach [was] not impermissibly broad," *id.* at 80, the Court construed the term "expenditure" under the disclosure provision in the same way it construed the Act's $1,000 spending cap—"to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* (footnote omitted).

*Buckley* left in its wake a regime that has been described as a "nonsensical, loophole-ridden patchwork," *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 518 (1985) (*NCPAC*) (White, J., dissenting), one that some observers believed was not worth the regulatory candle. *See, e.g., Buckley*, 424 U.S. at 236 (Burger, C.J., concurring in part and dissenting in part) ("[W]hat remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a

workable program."); *see also, e.g.*, Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 939 n.1 (1985) (expressing doubt that "a rational legislature would ever have passed" as "a unified package" the "crazy quilt" of statutes and regulations governing campaign finance after *Buckley*).[24] The following paragraphs describe the regulatory scheme that unfolded after *Buckley;* the discussion is included to provide a context for BCRA's enactment and to help make clearer what BCRA is designed to accomplish.

As noted, the *Buckley* Court left in place several of the Act's major components. Significantly, *all* of the Act's contribution limits remained (and, indeed, the Congress even added some more in the 1976 amendments): no person could contribute to any candidate more than $1,000 per election,[25] *see* 2 U.S.C. § 441a(a)(1)(A); no person could contribute to the committees of a national political party more than $20,000 during any calendar year,[26] *see id.* § 441a(a)(1)(B); no person could contribute to any political committee (other than a national political party committee) more than $5,000 during any calendar year,[27] *see id.* § 441a(a)(1)(C); no

[24] When faced with the task of enacting emergency amendments in response to *Buckley*, the Congress had little time to reevaluate the combination of provisions the decision left standing. As then Assistant Attorney General Antonin Scalia put it, the "whole purpose of our [amendments] is to submerge those issues that are controversial and to do the minimum amount necessary to enable the 1976 elections to proceed." Office of Legal Counsel Statement accompanying § 2911, Legislative History of FECA Amendments of 1976, at 142 (Feb. 18, 1976).

[25] BCRA raises the limit to $2,000 per election. *See* BCRA § 307(a)(1); *see also infra* Part II.G.

[26] BCRA raises the limit to $25,000 during any calendar year. *See* BCRA § 307(a)(2).

[27] BCRA amends the Act to permit a person to contribute up to $10,000 per year to a state political party committee. *See* BCRA § 102; FECA § 315(a)(1)(D); 2 U.S.C. § 441a(a)(1)(D).



political committee could contribute to any candidate more than $5,000 per election, *see id.* § 441a(a)(2)(A); no political committee could contribute to the committees of a national political party more than $15,000 during any calendar year, *see id.* § 441a(a)(2)(B); and no political committee could contribute to any other political committee more than $5,000 during any calendar year, *see id.* § 441a(a)(2)(C). Moreover, if any national or state political party committee coordinated its *expenditures* with a specific candidate for the purpose of benefiting the candidate, i.e., if the committee spent funds "in connection with" the candidate's campaign, the expenditures were treated like contributions—they were subject to formula-driven monetary ceilings, albeit ones that were slightly higher than the $5,000 limit on any political party committee's contributions to any candidate.[28] *Compare id.* § 441a(a)(2)(A), *with id.* § 441a(d); *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (*Colorado Republican II*) (holding section 441a(d) not facially unconstitutional because "a [political] party's *coordinated* expenditures . . . may be restricted to minimize circumvention" of FECA's contribution-to- candidate limits (emphasis added)); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613-23 (1996) (*Colorado Repub-*

[28] National political party committees could not (and still cannot) make any expenditure "in connection with" the general election campaign of any candidate for President "which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States." 2 U.S.C. § 441a(d)(2). National and state political party committees could not (and still cannot) make any expenditure "in connection with" the election campaign of any candidate for the office of Senator—or of Representative from a State which is entitled to only one Representative—"which exceeds . . . the greater of . . . 2 cents multiplied by the voting age population of the State . . . or . . . $20,000." *Id.* § 441a(d)(3)(A). And, finally, the national and state political party committees could not (and still cannot) make any expenditure "in connection with" the election campaign of any candidate for the office of Representative, Delegate or Resident Commissioner "which exceeds . . . $10,000." *Id.* § 441a(d)(3)(B).

*lican I*) (plurality opinion) (holding section 441a(d) unconstitutional as applied to political party's *independent* expenditures). Finally, a sweeping source restriction not challenged in *Buckley* prohibited (and still prohibits) any national bank, corporation or labor organization from making—or any officer thereof from approving—a contribution "in connection with" any federal election.[29] 2 U.S.C. § 441b(a). The same provision also forbade (and still forbids) "any candidate, political committee, or other person knowingly to accept or receive" any corporate or labor contribution. *Id.*

FECA's post-*Buckley* source-and-amount provisions thus restricted all of the money contributed—and much of the money spent—"in connection with" or "for the purpose of influencing" federal elections. In a 1978 advisory opinion, however, the FEC made clear that these "federal" or "hard" money restrictions extended only so far and that the Act permitted political parties to use funds, including corporate and union funds, not subject to source-and-amount limits to pay for activities benefiting both federal and state candidates. *See generally* FEC Advisory Op. 1978-10: Allocation of Costs for Voter Registration, *available at* http://herndon3.sdrdc.com/ao/ao/780010.html. Commission regulations then in effect permitted parties to "allocate" administrative expenses—including rent, utilities and supplies—between federal and state candidates based upon the proportionate benefit received. Under the allocation regime, amounts spent on administrative expenses for state candidates were not subject to FECA's source-and-amount restrictions. That is, administrative expenses could be paid for with state-regulated

[29] For a brief history of the ban on corporate and labor funds, *see Buckley*, 519 F.2d at 904-07 (noting Tillman Act of 1907, War Labor Disputes Act of 1943 and Taft-Hartley Act of 1947 barred corporate and labor contributions). *See also* Gov't Br. at 12-15 (citing, *inter alia*, WILLIAM A. WHITE, THE OLD ORDER CHANGETH 11-15 (1910)).



"non-federal" funds—a.k.a. "soft money"[30]—because such funds were not given or spent "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i) (defining "contribution" and "expenditure"). When the Kansas Republican State Committee asked the FEC whether it was permitted to allocate expenses for voter registration and get-out-the-vote drives that benefited both the state and federal candidates on a given ticket, the FEC responded that

> the costs of [such activities] should be allocated between Federal and non-Federal elections in the same manner as other general party expenditures. . . . That portion of the costs allocable to Federal elections . . . must come from funds . . . contributed in accordance with the limitations and prohibitions contained in 2 U.S.C. §§ 441a, 441b, 441c, 441e, 441f and 441g. . . . The costs allocable to non-Federal elections may be paid out of party funds

[30] As the FEC recently observed in regulations promulgated pursuant to BCRA, "the term 'soft money' is used by different people to refer to a wide variety of funds under different circumstances." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49064-65 (July 29, 2002). The Commission's *Twenty Year Report*, *see* FED. ELECTION COMM'N, TWENTY YEAR REPORT (1995) (hereinafter TWENTY YEAR REPORT), *available at* http://www.fec.gov/pages/20year.htm, provides a helpful, rough-and-ready definition of a commonly misunderstood term:

> [S]oft money—*n.* (slang): funds raised and/or spent outside the limitations and prohibitions of the FECA. Sometimes called nonfederal funds, soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of the federal limits, which cannot legally be used "in connection with" federal elections, but can be used for other purposes.

TWENTY YEAR REPORT, *supra*, at ch.3. Because the FEC itself has chosen to use the term "non-federal funds"—and because such funds *are* regulated by *state* law, *see* 67 Fed. Reg. at 49065—this opinion generally uses the terms "federal funds" and "non-federal funds" in lieu of "hard money" and "soft money."

> raised and expended pursuant to applicable Kansas law. . . . [W]ith respect to an election in which there are candidates for [both non-Federal] and Federal office, expenditures for registration and get-out-the-vote drives need not be attributed as contributions to [Federal] candidates unless the drives are made specifically on their behalf.

FEC Advisory Op. 1978-10. Because "applicable Kansas law" did not prohibit corporate and union donations and placed no ceilings on donations for state and local campaigns, federal candidates in Kansas were able to benefit—albeit indirectly—from such donations. *See* TWENTY YEAR REPORT, *supra*, at ch.3 (detailing history and pre-BCRA treatment of non-federal funds and explaining "[t]he origins of 'soft money' lie in the United States' federal system of government," under which "each [S]tate may establish its own rules for financing the nonfederal elections held within its borders").

The use of non-federal funds grew during the 1980s. New FEC regulations permitted political committees to allocate expenses between federal and non-federal accounts on a "reasonable basis." Proponents of tighter campaign finance restrictions criticized the standard, claiming that committees underestimated the federal share of their contributions and expenditures and thereby influenced federal elections with funds that would otherwise be subject to FECA's source-and-amount restrictions. In 1984 Common Cause petitioned the FEC to promulgate more stringent regulations to close the perceived loophole. After the FEC denied its petition, Common Cause sought relief in this court, which ordered the Commission to clarify its rules. *See generally Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987).

The amended regulations—which took effect on January 1, 1991—served as the basis of the federal/non-federal funding system until BCRA's enactment. The regulations set forth



several formulae fixing the maximum amount of money a political committee could use for an activity benefiting both federal and non-federal candidates, *see* 11 C.F.R. § 106.5(b)-(d) (1997), and required expanded reporting of mixed federal and non-federal giving and spending, *see* TWENTY YEAR REPORT, *supra*, at ch.3. "Despite the new rules," the Commission reported in 1995, some legislators and "reform" groups remained troubled by the growing influence of non-federal funds:

> They say, for example, that soft money spending—even for the non-federal share of expenses—influences federal elections because it permits committees to conserve federal funds that can later be spent to support federal candidates. Many are also concerned about the way committees raise soft money. They believe that the active role federal candidates and their associates play in raising large sums of soft money, at the very least, creates an appearance of undue influence by the contributors on the federal candidates involved.

*Id.* at ch.3. Non-federal donations to the two major political parties did, in fact, grow exponentially during the 1990s—from $86.1 million in the 1992 election cycle to $487.5 million in the 2000 cycle. *See infra* Findings of Fact (Findings) 65-66 at pages 139-40.

Proponents of tighter restrictions were disturbed by this trend not simply because, in their view, corporations and unions were effectively contributing funds to federal campaigns. *See* Mann Expert Report at 15 & Tbl.4. They worried as well about the parties' spending of non-federal funds on "issue ads"—issue-based but, at least to their ears, candidate-focused advertisements that do not expressly advocate the election or defeat of an identifiable federal candidate. *See* Intervenors Br. at 8-9 (discussing expanded role of non-federal funds in issue advertising during 1996 campaign); *see infra* note 75 (defining "issue ad" for purposes of this

opinion). They lamented that permitting such ads—which might discuss, for example, a candidate's record, ideological bent, accomplishments or failures but do not "exhort the viewer to take a specific electoral action for or against a particular candidate"—would "allow [ ] individuals and organizations to circumvent [FECA's restrictions] simply by omitting from their communications the genre of words and phrases" found in *Buckley*'s famous footnote 52. *Chamber of Commerce v. Moore*, 288 F.3d 187, 195 (5th Cir.) (holding that, under *Buckley*, political advertisement may be regulated constitutionally only if it contains explicit words advocating election or defeat of clearly identified candidate), *cert. denied*, 123 S. Ct. 536 (2002); *see Buckley*, 424 U.S. at 44 n.52 (express words of advocacy include "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

BCRA's provisions, to which I now turn, embody the first congressional response to these and other perceived dropped stitches in the federal election law patchwork.

## II. A Catalogue of BCRA's Provisions and the Challenges Thereto

BCRA contains 38 sections that, *inter alia*, prohibit corporate and labor disbursements for "electioneering communications," require certain disclosures to the FEC, limit the source and amount of "coordinated expenditures," severely restrict the use of non-federal funds, bar minors from making contributions or donations, condition the lowest unit charge for broadcast ads on their content and increase the Act's existing contribution limits. The plaintiffs in these consolidated actions challenge—on free speech, free association, free press, right-to-petition, vagueness, equal protection and federalism grounds—nearly half of them. The following



sections describe the provisions at issue and catalogue all of the plaintiffs' constitutional challenges to the new law.[31]

### *A. The Ban on Corporate and Labor Disbursements for "Electioneering Communications"*

Section 203 of BCRA amends the Act to prohibit any corporation or labor organization from making any disbursement "for any applicable electioneering communication." BCRA § 203(a); FECA § 316(a), (b)(2); 2 U.S.C. § 441b(a), (b)(2). Under BCRA section 201,

> [t]he term "electioneering communication" means any broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party

[31] I discuss the statutory provisions here in the same sequence that I analyze them in Part IV. I address the "electioneering communications" provisions of Title II *before* analyzing Title I's restrictions on non- federal funds not simply because several plaintiffs initially raised their constitutional challenges in that order, *see generally* McConnell Compl., but because, under the Supreme Court's jurisprudence, any analysis of restrictions on non-federal funds must take account of the case law (discussed in the context of Title II) holding that issue advocacy cannot constitutionally be restricted. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 199 (1998) (hereinafter Smith, *Hard Realities*) ("[C]lear Supreme Court precedent instructs us that not only is party spending on issue advocacy protected, but so are donations, including corporate donations, to parties to engage in that advocacy."); *see also infra* Part III.C (courts are to apply "exacting" (i.e., strict) scrutiny to campaign finance restrictions on donations to political party committees that make independent expenditures in order to engage in collective issue advocacy).

that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A)(i); 2 U.S.C. § 434(f)(3)(A)(i). Section 201 provides a fallback definition set to take effect in the event the primary definition is invalidated:

> [T]he term "electioneering communication" [in that event] means any broadcast, cable, or satellite communication which promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for [Federal] office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). Additionally, section 201 exempts from either definition of electioneering communication

> (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;
>
> (ii) a communication which constitutes an expenditure or an independent expenditure under [FECA]; [or]
>
> (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum . . . .



BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B). While section 201 purports to authorize the Commission to exempt by regulation certain communications from either definition, *see* BCRA § 201(a); FECA § 304(f)(3)(B)(iv); 2 U.S.C. § 434(f)(3)(B)(iv), the Commission may not under any circumstances exempt

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)[.]

BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). Because the language of section 101(b) prohibits promulgation of a regulation that retreats from either the primary or fallback definition of electioneering communication, it leaves the Commission no room to adopt a more permissive restriction than that set forth in section 201.[32]

BCRA's ban on corporate and labor disbursements for electioneering communications applies to entities other than unions and for-profit corporations. Section 203(a) extends to *any* incorporated entity and therefore bars both incorporated non-profit organizations (as defined by section 501(c) of the Internal Revenue Code) and incorporated political organi-

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[32] It should come as no surprise, then, that "[t]he definition of 'electioneering communication' at 11 C.F.R. 100.29(a)"—adopted by the FEC pursuant to BCRA—"largely tracks the definition in BCRA at 2 U.S.C. 434(f)(3)." Electioneering Communications, 67 Fed. Reg. 65,190, 65,191 (October 23, 2002).

zations (as defined by section 527 of the Internal Revenue Code) from making disbursements for electioneering communications.[33] True, section 203(b) provides that

> the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) . . . if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence[.]

BCRA § 203(b); FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2). But section 204—referred to by the parties as the "Wellstone Amendment"—eliminates the section 203(b) exception:

> EXCEPTION DOES NOT APPLY.—[FECA section 316(c)(2)] shall not apply in the case of a targeted communication that is made by an organization described in such paragraph. . . . [T]he term "targeted communication" means an electioneering communication (as defined in [FECA] section 304(f)(3)) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in

[33] Under section 203's "special operating rules,"

> [a] section 501(c)(4) organization that derives amounts from business activities or receives funds from [a national bank, corporation or labor union] shall be considered to have paid for any communication out of [prohibited funds] unless such organization paid for the communication out of a segregated account to which only individuals can contribute . . . .

BCRA § 203(b); FECA § 316(c)(3)(B); 2 U.S.C. § 441b(c)(3)(B). Section 204 makes the "special operating rule" irrelevant because, under that provision, a section 501(c)(4) organization is treated like any other corporation and will be "considered to have paid for any communication out of [prohibited funds]" even where it does *not* receive funds from a national bank, for-profit corporation or labor union.



> the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[34]

BCRA § 204; FECA § 316(c)(6)(A), (B); 2 U.S.C. § 441b(c)(6)(A), (B). By definition, an "electioneering communication" is "distributed from a television or radio broadcast station or provider of cable or satellite television service" and either refers to a candidate for President or Vice President or is "targeted to the relevant electorate" of any other candidate. The Wellstone Amendment therefore ensures that no electioneering communication made by an incorporated political organization or non-profit corporation can shelter under section 203(b)—if a communication is an "electioneering communication," it fails *a fortiori* to qualify for the exception.

The *McConnell, NRA, Chamber of Commerce, NAB* and *AFL-CIO* plaintiffs challenge the ban on corporate and labor disbursements for electioneering communications on several interrelated constitutional grounds. First, they allege that the ban abridges their First Amendment rights to engage in core political speech and expressive association by "limiting speech that does not expressly advocate the election or defeat of a clearly identified candidate, either under the original definition or the fall-back definition of 'electioneering communication,'" McConnell Compl. at ¶¶ 48, 62; *see also, e.g.*, McConnell Br. at 44-56; Chamber of Commerce Br. at 4-5; AFL-CIO Br. at 3-11; ACLU Br. at 4-7, 11-16; and by failing to exempt non-profit advocacy organizations like

[34] Under BCRA section 201, a communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons . . . in the district the candidate seeks to represent, in the case of a candidate for Representative [or] . . . in the State the candidate seeks to represent, in the case of a candidate for Senator." BCRA § 201(a); FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C).

those identified in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), *see, e.g.*, McConnell Compl. at ¶ 49; *see also, e.g.*, ACLU Br. at 16-17.

Second, these plaintiffs claim that the ban—under either the primary or the fallback definition and even without reference to *Buckley*'s express advocacy test—is unconstitutionally overbroad, void for vagueness and so underinclusive that it fails to serve a compelling governmental interest. *See, e.g.*, McConnell Br. at 56-77; NRA Br. at 14-39.

Third, these plaintiffs assert that the ban violates the First Amendment and the equal protection component of the Fifth Amendment by (1) prohibiting non-media corporations, labor organizations, section 501(c) non-profit organizations and section 527 political organizations from engaging in certain broadcast speech while permitting individuals, unincorporated organizations and corporations that own broadcast stations to engage in the same or similar speech, *see, e.g.*, NRA Br. at 39-48; and (2) prohibiting disbursements for broadcast, satellite and cable communications while permiting disbursements for other communications, including the printed word, *see, e.g.*, NAB Compl. at ¶ 24; McConnell Br. at 77-81.[35]

I consider the constitutionality of the ban on corporate and labor disbursements for electioneering communications in Part IV.A *infra*.

[35] In a somewhat similar vein, the *Paul* plaintiffs claim that the ban violates the First Amendment's guarantee of a free press by imposing upon them "unconstitutional editorial control through discriminatory . . . economic burdens and penalties" not placed upon certain media organizations. Paul Am. Compl. (Paul Compl.) at ¶ 53; *see id.* at ¶¶ 47, 50; Paul Br. at 17-18, 21-24.



*B. Disclosure and Reporting Requirements*

Section 201 of BCRA amends the Act to require "[e]very person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" to file with the FEC, under penalty of perjury and "within 24 hours of each disclosure date," [36] BCRA § 201(a); FECA § 304(f)(1); 2 U.S.C. § 434(f)(1), a "statement" containing, *inter alia:*

- The identification of the person making the disbursement;
- The principal place of business of the person making the disbursement, if the person is not an individual; The amount of any single disbursement over $200;
- The identification of persons to whom any disbursement over $200 is made;
- The election to which an electioneering communication pertains;
- The candidate identified, or to be identified, in an electioneering communication; and

[36] Under BCRA section 201, the term "disclosure date" means

> (A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and
>
> (B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

BCRA § 201(a); FECA § 304(f)(4); 2 U.S.C. § 434(f)(4).

- If an organization makes the disbursement from funds donated by individuals, the names and addresses of any individuals donating $1,000 or more.

*See* BCRA § 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2).[37] A person must disclose the foregoing information not only when he makes a disbursement for electioneering communications but also when he *contracts* to make the disbursement.[38] *See* BCRA § 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).[39]

BCRA section 212 contains disclosure requirements pertaining not to electioneering communications but to "independent expenditures."[40] Amending section 304 of the Act,

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[37] BCRA directs the FCC to "compile and maintain" the information filed with the FEC and to "make such information available to the public on the [FCC's] website." BCRA § 201(b); FECA § 304 note; 2 U.S.C. § 434 note.

[38] Thus, in some circumstances (i.e., if a contract to disburse is not performed), BCRA mandates disclosure about planned disbursements for communications that never air.

[39] Under another Title (Title III), BCRA section 311 similarly amends the Act to provide that "whenever any person . . . makes a disbursement for an electioneering communication," the communication itself (1) if authorized by a candidate or an authorized political committee of a candidate, "shall clearly state that the communication is paid for by [the] person[ ] and authorized by such authorized political committee," BCRA § 311; FECA § 318(a)(2); 2 U.S.C. § 441d(a)(2); or (2) if *not* authorized by a candidate or an authorized political committee of a candidate, "shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee," BCRA § 311; FECA § 318(a)(3); 2 U.S.C. § 441d(a)(3).

[40] As amended by BCRA section 211, the Act states that

> the term "independent expenditure" means an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and



section 212 requires any person (including any individual) who disburses more than $1,000 in independent expenditures within 20 days of an election, BCRA § 212(a); FECA § 304(g)(1); 2 U.S.C. § 434(g)(1)—or more than $10,000 at any time up to and including the twentieth day before an election, BCRA § 212(a); FECA § 304(g)(2); 2 U.S.C. § 434(g)(2)—to file with the FEC, under penalty of perjury, a "report" specifying:

- The name and address of the recipient of any expenditure(s);
- The date, amount and purpose of the expenditure(s); and
- The name of, and office sought by, the candidate supported or opposed by the expenditure(s).

*See* BCRA § 212(a); FECA § 304(g)(3)(B), (b)(6)(B)(iii); 2 U.S.C. § 434(g)(3)(B), (b)(6)(B)(iii). A report on an independent expenditure made within 20 days of an election must be filed with the FEC within 24 hours of the expenditure; a report on an independent expenditure made at any time up to and including the twentieth day before an election must be made within 48 hours of the expenditure. *See* BCRA § 212(a); FECA § 304(g)(1), (2); 2 U.S.C. § 434(g)(1), (2). Just as a contract to make a disbursement for an electioneering communication triggers the pertinent disclosure requirements, *see* BCRA § 201(a); FECA § 304(f)(5);

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> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

BCRA § 211; FECA § 301(17); 2 U.S.C. § 431(17).

2 U.S.C. § 434(f)(5), so does a contract to make an independent expenditure, *see* BCRA § 212(a); FECA § 304(g)(1), (2); 2 U.S.C. § 434(g)(1), (2).[41]

A final cluster of new disclosure rules under challenge is found in Title V of BCRA. Section 504, which amends section 315 of the Federal Communications Act of 1934 (FCA), mandates disclosure of certain broadcast records. It requires broadcast licensees to "maintain, and make available for public inspection, a complete record" of any "request" of any person "to purchase broadcast time" for communications "relating to any political matter of national importance."[42] BCRA § 504; FCA § 315(e)(1); 47 U.S.C. § 315(e)(1). Each record maintained must include the following information:

- Whether the request to purchase broadcast time is accepted or rejected by the licensee;[43]
- The rate charged for the broadcast time;
- The date on which and the time at which the communication is to be aired;

[41] Thus, in some circumstances (i.e., if a contract to make expenditures is not performed), BCRA mandates disclosure about expenditures that are never made. *Cf. supra* note 38.

[42] Under section 504, a "political matter of national importance" includes any matter regarding "a legally qualified candidate," "any election to Federal office" or "a national legislative issue of public importance." BCRA § 504; FCA § 315(e)(1)(B); 47 U.S.C. § 315(e)(1)(B).

[43] Because section 504's requirements are triggered not when the communication in question is broadcast but instead when any person makes "a *request* to purchase broadcast time," BCRA § 504; FCA § 315(e)(1); 47 U.S.C. § 315(e)(1) (emphasis added), BCRA in some circumstances (i.e., if a request is denied) mandates disclosure about communications that never air. *Cf. supra* notes 38, 41.



- The name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers or the issue to which the communication refers;
- In the case of a request made by or on behalf of a candidate, the name of the candidate, his authorized committee and the treasurer of that committee; and
- In the case of any other request, the name of the person seeking to purchase the time, the name, address and phone number of "a contact person for such person" and a list of the chief executive officers or members of the board of directors of the person (if the person is not an individual).

BCRA § 504; FCA § 315(e)(2); 47 U.S.C. § 315(e)(2).

The *McConnell, NRA, Chamber of Commerce, NAB and AFL-CIO* plaintiffs challenge BCRA's disclosure and reporting requirements on three First Amendment grounds. First, they allege that the provisions mandating detailed statements about disbursements for electioneering communications, *see* BCRA §§ 201 and 311, violate their First Amendment rights to free political expression and association by restricting in an overbroad, vague and underinclusive fashion their airing of communications that do not contain express advocacy. *See, e.g.*, McConnell Br. at 44-77; NRA Br. at 48-50; Chamber of Commerce Br. at 18-20; ACLU Br. at 11-19.

Second, these plaintiffs claim that the reporting requirements of BCRA section 212, pertaining to independent expenditures, impermissibly burden their First Amendment rights to free political expression and association by requiring "*advance* disclosures of planned and prospective communications, including communications that ultimately are never made." AFL-CIO Compl. at ¶ 35 (emphasis added); *see, e.g.*, AFL-CIO Br. at 14-17.

Third, these plaintiffs assert that the disclosure requirement of section 504, pertaining to requests to purchase broadcast time, burdens their First Amendment rights to engage in political expression and association by, *inter alia*, imposing vague and overbroad recordkeeping requirements that "lack[ ] any rational relationship to a legitimate governmental objective." McConnell Br. at 99; *see, e.g., id.* at 98-100; AFL-CIO Br. at 18-20.

I consider the constitutionality of the disclosure and reporting provisions in Part IV.B *infra*.

*C. Limits on "Coordinated Expenditures"*

BCRA section 202 amends the Act to provide that if

> (i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of [FECA] section 304(f)(3)); and
>
> (ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal [sic], State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

then the disbursement or contract to disburse "shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party." BCRA § 202(2); FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C). By treating a "coordinated" disbursement for an electioneering communication as a "contribution" to the supported candidate, section 202 subjects it to the Act's source-and-amount limitations.[44] Moreover, as amended by BCRA,

[44] For a recap of FECA's major source-and-amount limitations, *see supra* Part I, especially the text accompanying notes 25-29. It bears emphasizing that because any corporation or labor organization is prohibited from making a "contribution or expenditure in connection with any election" for federal office, 2 U.S.C. § 441b(a), it is likewise banned under BCRA from making "coordinated" disbursements.



the Act equates "cooperation," "consultation," "concert" and "suggestion" with "coordinat[ion]"—a disbursement made in any such fashion will be treated as a contribution. *See* BCRA § 214(a); FECA § 315(a)(7)(B); 2 U.S.C. § 441a(a)(7)(B). BCRA directs the FEC to define "coordination" broadly; section 214, which repeals the Commission's existing regulations on coordinated communications, provides that in prescribing the prerequisites for coordination, the new regulations "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and a person making a disbursement.[45] BCRA § 214(c); FECA § 315(a)(7) note; 2 U.S.C. § 441a(a)(7) note.

[45] In accordance with that mandate, the FEC on January 3, 2003 promulgated a final rule on "coordinated expenditures." *See generally* Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003); *see also infra* Finding 57 at pages 129-32. Not surprisingly, the rule provides that a disbursement for an electioneering communication is "coordinated" with a candidate or political party committee—"whether or not there is agreement or formal collaboration" between the disburser and the candidate or committee—if (1) "[t]he communication is created, produced, or distributed at the request or suggestion" of the candidate or committee; (2) the candidate or committee "is materially involved in decisions regarding" the communication; or (3) "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication" between the disburser and the candidate or committee. 68 Fed. Reg. at 453-55. Under the rule, "[a]greement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination" and "[f]ormal collaboration means planned, or systematically organized, work on the communication." *Id.* at 455 (emphasis omitted).

The other "coordinated expenditure" provision at issue, BCRA section 213, amends the Act to provide that

> [o]n or after the date on which a political party nominates a candidate, no committee of the political party may make—
>
> (i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in [FECA] section 301(17)) with respect to the candidate during the election cycle; or
>
> (ii) any independent expenditure (as defined in [FECA] section 301(17)) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle. BCRA § 213; FECA § 315(d)(4)(A); 2 U.S.C. § 441a(d)(4)(A).

In other words, section 213 compels a political party committee, at the time the party's candidate is nominated, to make a binding choice between independent expenditures and "coordinated" disbursements in support of the candidate. In addition, "all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee" under the provision. BCRA § 213; FECA § 315(d)(4)(B); 2 U.S.C. § 441a(d)(4)(B). That is, regardless whether any of the related political committees has any control over, influence on or knowledge of the disbursement decisions of the others, the first disbursement decision made on behalf of the "single political committee" binds the other component committees.



The *McConnell, Chamber of Commerce, AFL-CIO, RNC* and *CDP* plaintiffs challenge BCRA's "coordinated expenditure" provisions primarily on two constitutional grounds. First, they allege that sections 202 and 214 infringe their First Amendment rights to free speech, association and petition for redress of grievances by defining coordination too broadly. *See, e.g.*, McConnell Br. at 82-85; Chamber of Commerce Br. at 6-18; AFL-CIO Br. at 12-14; ACLU Br. at 7-9, 19-20.

Second, the political party plaintiffs claim that the binding choice provision, section 213, burdens their First Amendment freedoms of speech, association and petition by requiring them to forgo "future coordinated expenditures as the 'price' of exercising their constitutional right to make independent expenditures." RNC Compl. at ¶ 60; *see, e.g.*, McConnell Br. at 85-88; RNC Br. at 72; CDP Br. at 47-49.

I consider the constitutionality of the limits on "coordinated expenditures" in Part IV.C *infra*.

### *D. Restrictions on Non-Federal Funds*

The most publicized provision of BCRA, section 101, is also the statute's lengthiest and most complex. Section 101, in a nutshell, curtails political party committees' use of non-federal funds—funds not subject to FECA's source-and-amount limitations, *see supra* note 30 and accompanying text—in order to reduce such funds' allegedly corrupting influence on federal officeholders. In the following paragraphs, I discuss in turn (and, for the sake of precision, reproduce at length) the provision's major components.

Adding section 323 ("Soft Money of Political Parties") to the Act, section 101 first prohibits, in FECA section 323(a), any national political party committee from soliciting, receiving, directing or spending non-federal funds for any purpose whatsoever:

> A national committee of a political party (including a national congressional campaign committee of a political

party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

BCRA § 101(a); FECA § 323(a)(1); 2 U.S.C. § 441i(a)(1). The ban, which has no exceptions, applies broadly to

> any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

BCRA § 101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2).

Adding section 323(b) to the Act, BCRA further prohibits any state, district or local political party committee from spending or disbursing non-federal funds for any "Federal election activity":

> [A]n amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

BCRA § 101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). "Federal election activity" is defined to include:

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;



> (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
>
> (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
>
> (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). The definition of "Federal election activity" *excludes* any "amount expended or disbursed by a State, district, or local committee of a political party" for

> (i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);
>
> (ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);
>
> (iii) the costs of a State, district, or local political convention; and

> (iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

BCRA § 101(b); FECA § 301(20)(B); 2 U.S.C. § 431(20)(B). At paragraph (2)—commonly known as the "Levin Amendment"—section 323(b) provides a narrow exception to the general rule against state-party spending of non-federal funds on "Federal election activity." The Levin Amendment allows state and local parties to use an FEC-specified amount of federally-regulated "Levin funds" for voter registration, voter identification, "generic campaign activity" and get-out-the-vote activity as long as

> (i) [such] activity does not refer to a clearly identified candidate for Federal office;
>
> (ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;
>
> (iii) . . . *no person . . . donate[s] more than $10,000* to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and
>
> (iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement . . . .

BCRA § 101(a); FECA § 323(b)(2)(B); 2 U.S.C. § 441i(b)(2)(B) (emphasis added); *see* RNC Br. at 22-23 (discussing Levin Amendment's conditions, including "homegrown" funds requirement of subsection (iv), which prohibits a state party committee from receiving transferred funds from a national party committee or another state or local committee of a political party).



At new FECA section 323(c), BCRA requires every political party committee—national, state or local—to use federal funds to raise any money that will be used, in turn, on "Federal election activity." BCRA § 101(a); FECA § 323(c); 2 U.S.C. § 441i(c).

Under new FECA section 323(d), BCRA prohibits any political party committee—national, state or local—or its agents from "solicit[ing] any funds for, or mak[ing] or direct[ing] any donations to" (1) any organization that is described in section 501(c) of the Internal Revenue Code of 1986, is exempt from taxation and "makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (2) any organization (other than a political committee) that is described in section 527 of such Code. BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d).

At new FECA section 323(e), the statute prohibits any federal candidate or officeholder (or any agent of a federal candidate or officeholder) from soliciting, receiving, directing, transferring or spending non-federal funds "in connection with an election for Federal office, including funds for any Federal election activity."[46] BCRA § 101(a); FECA § 323(e)(1)(A); 2 U.S.C. § 441i(e)(1)(A).

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[46] Notwithstanding the general ban on any federal candidate or officeholder's connection with non-federal funds, such a candidate or officeholder may "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party," BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3), or "make a general solicitation of funds on behalf of any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation . . . where such solicitation does not specify how the funds will or should be spent," BCRA § 101(a); FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A); *see also* BCRA § 101(a); FECA § 323(e)(4)(B); 2 U.S.C. § 441i(e)(4)(B) (permitting certain other solicitations).

Finally, at new FECA section 323(f), the statute bars any *state* candidate or officeholder (or any agent of a state candidate or officeholder) from spending any non-federal funds for

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).

BCRA § 101(a); FECA §§ 323(f)(1), 301(20)(A)(iii); 2 U.S.C. §§ 441i(f)(1), 431(20)(A)(iii).

The *McConnell, RNC* and *CDP* plaintiffs challenge BCRA's restrictions on non- federal funds on three grounds. First, they allege that the restrictions "intrud[e] upon the sovereign power of the [S]tates to regulate the financing of their own elections" and thereby violate the Tenth Amendment to the United States Constitution. RNC Compl. at ¶ 39; *see, e.g.*, McConnell Br. at 9-25 (challenging restrictions on their face and as applied to Libertarian National Committee); RNC Br. at 25-37; CDP Br. at 20-27.

Second, these plaintiffs assert that section 101 violates their rights to engage in free speech and expressive association by, *inter alia:* preventing "the funding of core political speech that does not expressly advocate the election or defeat of a clearly identified federal candidate," RNC Compl. at ¶ 48, restricting "the amount of speech in which political parties are able to engage," *id.*, preventing political parties from "pooling the resources of party members and contributors in support of campaigns for office," McConnell Compl. at ¶ 100, and precluding them from raising funds for or accepting funds from "like-minded party committees and non-party organizations and individuals," *id. See, e.g.*, McConnell Br. at 25-40; RNC Br. at 37-56; CDP Br. at 27-46.



Third, these plaintiffs charge that section 101 denies them equal protection (and violates their First Amendment rights) to the extent that it subjects them to speech restrictions not placed upon similarly situated entities.[47] *See, e.g.*, McConnell Br. at 40-43; RNC Br. at 57-70.

I consider the constitutionality of section 101 in Part IV.D *infra*.

*E. The Ban on Minors' Contributions and Donations*

In contrast to most of BCRA's provisions, section 318 is quite simple—it prohibits any person under the age of 18 from making (1) any contribution whatsoever to any federal candidate; or (2) any contribution or non-federal "donation" to any political party committee. *See* BCRA § 318; FECA § 324; 2 U.S.C. § 441k ("An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party."). Period.

The *McConnell* and *Echols* plaintiffs contend that such a "sweeping restriction" on an entire class of expressive and associational activity by minors cannot be upheld under the First Amendment's guarantees or the Fifth Amendment's

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[47] Additionally, the *Thompson* plaintiffs contend that "[a]s Federal office holders and candidates" they are "unfairly prejudiced" by section 101—in violation of their rights to free speech, association and equal protection—to the extent that the provision has a "disproportionate effect on minority communities" in their districts. Thompson Compl. at ¶ 41; *see* Thompson Br. at 1-12. And the *Paul* plaintiffs claim that section 101 abridges their freedom of the press "by exercising editorial control of their press activities." *E.g.*, Paul Br. at 18 (capitalization altered).

equal protection component.[48] *E.g.*, Echols Am. Compl. at ¶¶ 55, 57, 62, 65; *see also, e.g.*, McConnell Compl. at ¶ 93; McConnell Br. at 91-95. I address this challenge in Part IV.E *infra*.

*F. The Conditions on the Lowest Unit Broadcast Charge*

Until BCRA's enactment, section 315 of the FCA required licensed broadcast stations to provide a candidate for public office—during the 45 days before a primary election and the 60 days before a general or special election—the benefit of "the lowest unit charge of the station" on any broadcast advertisement "in connection with" the candidate's campaign. FCA § 315(b); 47 U.S.C. § 315(b). BCRA section 305, however, amends the FCA to deny a candidate the lowest unit charge for television or radio broadcast advertisements unless the candidate "provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office." BCRA § 305(a)(3); FCA § 315(b)(2)(A); 47 U.S.C. § 315(b)(2)(A). If the candidate *does* make a direct reference to another candidate, he can nonetheless meet the content requirements for the lowest unit charge if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds—

> (i) a clearly identifiable photographic or similar image of the candidate; and
>
> (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast[;] or if, in the case of a radio broadcast, the broadcast includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast.

BCRA § 305(a)(3); FCA § 315(b)(2)(C), (D); 47 U.S.C. § 315(b)(2)(C), (D).

[48] Similarly, one of the *Thompson* plaintiffs alleges that section 318 violates his First and Fifth Amendment rights to the extent that it prevents him from "protect[ing] the rights" of one of his minor constituents. Thompson Compl. at ¶ 48; *see* Thompson Br. at 13-18.



The *McConnell* plaintiffs contend that BCRA section 305 violates the First Amendment's guarantee of free speech by "conditioning the cost of advertisements on their content." McConnell Compl. at ¶ 96; *see* McConnell Br. at 89-91. I discuss section 305 in Part IV.F *infra*.

*G. Increased Contribution Limits*

BCRA contains two types of provisions that increase the contribution limits of the Act. The first type raises the "hard money" ceilings of the Act by permitting individual donors to contribute greater amounts to candidates and national and state political party committees. The second type permits a candidate for either house of the United States Congress to accept and spend contributions in excess of otherwise applicable limits if his opponent expends a substantial amount in personal funds. I discuss these two types of provisions, and the plaintiffs' challenges thereto, in turn.

1. General Increases

BCRA section 307 raises the Act's limit on any individual's contribution to any given candidate (or his authorized political committee) from $1,000 to $2,000.[49] *See* BCRA § 307(a)(1); FECA § 315(a)(1)(A); 2 U.S.C. § 441a(a)(1)(A). It also changes the aggregate limit an individual contributor may give to all candidates from $25,000 during

[49] The Act now provides that "no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000." 2 U.S.C. § 441a(a)(1)(A).

any calendar year to $37,500 over a two-year period and changes the aggregate limit an individual contributor may give to all political party committees to $57,500 over a two-year period.[50] *See* BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3). Together with BCRA section 102, section 307 increases as well the Act's limits on an individual's contributions to a national political party committee (from $20,000 to $25,000 per calendar year) and to a state political party committee (from $5,000 to $10,000 per calendar year). *See* BCRA §§ 102, 307(a)(2); FECA § 315(a)(1)(B), (D); 2 U.S.C. § 441a(a)(1)(B), (D). The provisions leave in place, however, the Act's $5,000 limit on an individual's contributions to "any other political committee." *See* 2 U.S.C. § 441a(a)(1)(C). Finally, BCRA section 307 indexes for inflation all but the $10,000 limit on any individual's contributions to a state political party committee and the $5,000 cap on any individual's contributions to "any other political committee." [51]

The *Adams* and *CDP* plaintiffs challenge BCRA's general contribution increases on rather novel constitutional grounds. The *Adams* plaintiffs charge that the higher ceilings violate their Fifth Amendment right to equal protection by

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[50] The Act now provides that

> [d]uring the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
>
> (A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;
>
> (B) $37,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

2 U.S.C. § 441a(a)(3).

[51] The Act's indexing guidelines, as amended by BCRA section 307(d), appear at 2 U.S.C. § 441a(c).



"precluding equal participation in the political process on the basis of economic status." Adams Compl. at ¶ 60; *see* Adams Br. at 9-18. The *CDP* plaintiffs allege that to the extent BCRA indexes for inflation the limits on contributions to national party committees and federal candidates but does not index the limits on contributions to state and local party committees, it "severely erode[s]" their ability to engage in political communications and thus deprives them of equal protection.[52] CDP Compl. at ¶ 105; *see* CDP Br. at 50.

2. The "Millionaire Provisions"

BCRA section 304 amends the Act to permit a candidate for the United States Senate to accept and spend individual contributions in excess of otherwise applicable "hard money" limits in order "to allow response to expenditures from personal funds" of a wealthy opponent. BCRA § 304(a)(2); FECA § 315(i); 2 U.S.C. § 441a(i) (capitalization altered). For example, if a candidate's opponent spends over two but less than four times a specified "threshold amount"[53] in

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[52] In a similar vein, the *Paul* plaintiffs assert that by "failing to raise . . . and to index [contribution] limits with respect to political committees functioning independently from candidates, their authorized campaign committees, or political parties," BCRA violates the First Amendment's guarantee of a free press. Paul Compl. at ¶ 57; *see* Paul Br. at 27 n.11.

[53] The subparagraph pertaining to "threshold amount" provides as follows:

> (i) STATE-BY-STATE COMPETITIVE AND FAIR CAMPAIGN FORMULA.—In this subsection, the threshold amount . . . is an amount equal to the sum of—
>
> (I) $150,000; and
>
> (II) $0.04 multiplied by the voting age population.
>
> (ii) VOTING AGE POPULATION.--In this subparagraph, the term "voting age population" means in the case of a candidate for the office of Senator, the voting age population of the State of the candidate (as certified under [FECA] section 315(e)).

BCRA § 304(a)(2); FECA § 315(i)(1)(B); 2 U.S.C. § 441a(i)(1)(B).

"opposition personal funds,"[54] the candidate may accept individual contributions of $6,000 per donor per election. *See* BCRA § 304(a)(2); FECA § 315(i)(1)(C)(i); 2 U.S.C. § 441a(i)(1)(C)(i) ("[I]f the opposition personal funds amount is over . . . 2 times the threshold amount, but not over 4 times that amount . . . the increased limit shall be 3 times the applicable limit . . . ."). If the opponent spends from four to ten times the threshold amount in personal funds, the candidate may accept individual contributions of $12,000 per donor per election. *See* BCRA § 304(a)(2); FECA § 315(i)(1)(C)(ii); 2 U.S.C. § 441a(i)(1)(C)(ii). And if the opponent spends over ten times the threshold amount in personal funds, not only may the candidate accept individual contributions of $12,000 per donor per election but also, significantly, the restrictions on any political party committee's spending "in coordination with" the candidate are lifted. *See* BCRA § 304(a)(2); FECA § 315(i)(1)(C)(iii); 2 U.S.C. § 441a(i)(1)(C)(iii).

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[54] The "opposition personal funds" amount is "an amount equal to the excess (if any)" of

> (i) the greatest aggregate amount of expenditures from personal funds (as defined in [FECA] section 304(a)(6)(B)) that an opposing candidate in the same election makes; over
>
> (ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

BCRA § 304(a)(2); FECA § 315(i)(1)(D); 2 U.S.C. § 441a(i)(1)(D); *see* BCRA § 316; FECA § 315(i)(1)(E); 2 U.S.C. § 441a(i)(1)(E) ("aggregate amount of expenditures from personal funds" includes "gross receipts advantage" of candidate's authorized committee). In turn, an "expenditure from personal funds" is

> (I) an expenditure made by a candidate using personal funds; and
>
> (II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

BCRA § 304(b)(2); FECA § 304(a)(6)(B)(i); 2 U.S.C. § 434(a)(6)(B)(i).



Likewise, BCRA section 319 amends and supplements the Act to permit a candidate for the United States House of Representatives to accept and spend individual contributions of $6,000 per donor per election if his opponent spends over $350,000 in personal funds. *See* BCRA § 319(a); FECA § 315A(a)(1)(A); 2 U.S.C. § 441a-1(a)(1)(A). Again, significantly, in that same circumstance the restrictions on any political party committee's spending "in coordination with" the candidate are lifted. *See* BCRA § 319(a); FECA § 315A(a)(1)(C); 2 U.S.C. § 441a-1(a)(1)(C).

Finally, BCRA sections 304 and 319 impose reporting requirements on Senate and House candidates who intend to expend substantial personal funds in support of their candidacy. Section 304 requires a Senate candidate to file with his opponent(s) and the FEC—within 15 days of becoming a candidate—"a declaration stating the total amount of expenditures from personal funds that [he] intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula." BCRA § 304(b); FECA § 304(a)(6)(B)(ii); 2 U.S.C. § 434(a)(6)(B)(ii). It also requires the candidate to file with his opponent(s) and the FEC a notification if and when he spends more than twice the threshold amount and, thereafter, each and every time he spends more than $10,000 in additional personal funds. *See* BCRA § 304(b); FECA § 304(a)(6)(B)(iii), (iv); 2 U.S.C. § 434(a)(6)(B)(iii), (iv). Section 319 imposes similar requirements on a candidate for the House of Representatives. *See* BCRA § 319(a); FECA § 315A(b)(1); 2 U.S.C. § 441a-1(b)(1).

The *RNC* and *Adams* plaintiffs challenge BCRA's "millionaire provisions" on separate constitutional grounds. The *RNC* plaintiffs claim that the provisions "discriminate among similarly situated federal candidates and thereby violate the equal protection component of the Fifth Amendment." RNC Br. at 73 (capitalization altered); *see id.* at 73-75; RNC

Compl. at ¶ 74. The *Adams* plaintiffs assert that they are denied equal protection as well, to the extent that the millionaire provisions "preclud[e] [their] equal participation in the political process on the basis of economic status." Adams Compl. at ¶ 62; *see* Adams Br. at 9-18.

I discuss the two types of increased contribution limits in Part IV.G *infra*.

## III. *In Limine* Matters

Before reaching the merits of the plaintiffs' claims, I first attend to important preliminary matters.

### *A. Procedural Posture*

In these consolidated actions, the panel is asked to declare most of BCRA unconstitutional and to enjoin the defendants and their agents from enforcing, executing or otherwise applying several of its provisions to anyone. *See, e.g.*, McConnell Compl. at 51. In other words, the plaintiffs bring a facial challenge to the statute. As the Supreme Court emphasized in *United States v. Salerno*, 481 U.S. 739 (1987), a facial challenge is "the most difficult challenge to mount successfully" because, in the usual case, "the challenger must establish that no set of circumstances exists under which the [statute] would be valid," *id.* at 745. The case before us, however, is not the usual case. Where, as here, First Amendment freedoms are at stake, a facial challenge will succeed if there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (citing, *inter alia*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)); *see Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973) (facial invalidation "is, manifestly, strong medicine" that will be invoked only if statute's provisions are substantially overbroad when "judged in relation to the statute's plainly legitimate sweep"); *see also Salerno*, 481 U.S. at 745



(recognizing First Amendment overbreadth doctrine as exception to general "no- set-of-circumstances" principle). In my view, all of the challenged provisions of BCRA—except the one discussed in Part IV.D.4 (which I believe must be sustained) and those discussed in Parts IV.F and IV.G (as to which I would pass no judgment)—are substantially overbroad when "judged in relation to [their] plainly legitimate sweep" and are therefore facially unconstitutional. *Broadrick*, 413 U.S. at 615.

Because my view that most of BCRA is unconstitutional rests squarely and solely on First Amendment free association and free speech grounds, I would not reach the merits of the plaintiffs' federalism, free press or equal protection claims except with respect to the provision discussed in Part IV.D.4. Thoroughgoing discussion of these subjects would further complicate an already difficult task; more importantly, it would be unnecessary to the disposition of these actions and, as such, would fly in the face of the "venerable principle of [federal] adjudicatory processes," *Webster v. Reproductive Health Services*, 492 U.S. 490, 525 (1989) (O'Connor, J., concurring in part and concurring in judgment), to abstain from "anticipat[ing] a question of constitutional law in advance of the necessity of deciding it," *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quotation omitted).

### *B. Alternative Findings of Fact*

Before proceeding to the facts, I emphasize the Supreme Court's teaching that "casual statements from the floor debates" in the Congress—not to mention "post-legislation legislative history" like that constructed during discovery in these actions—merit little evidentiary weight. *See United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in judgment) ("post- legislation legislative history" is an "oxymoron"); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974) ("[P]ost-passage remarks of legislators,

however explicit, cannot serve to change the [expressed] legislative intent of Congress. . . ."). And while the Congress's factual findings and committee reports are entitled to somewhat greater weight, *see Garcia v. United States*, 469 U.S. 70, 76 (1984) (Court "eschew[s] reliance on the passing comments of one Member" and has "stated that Committee Reports are more authoritative than comments from the floor" (quotations omitted)); *but cf. Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 715, 718 (D.C. Cir. 1987) (Buckley, J., concurring) (because "Congress is a political as well as a legislative body, and [because] its members will put the privileges and facilities of their respective chambers to political as well as legislative uses," "not every utterance to be found [even] in committee reports . . . may be assumed to represent statutory gold"), such evidentiary sources are negligible or non-existent in the case of BCRA. I point out as well the Court's reminder that "[t]he justification" for a restriction on constitutionally protected liberties "must be genuine, not hypothesized or invented *post hoc* in response to litigation." United States v. Virginia, 518 U.S. 515, 533 (1996). Finally, I would note that I am in substantial agreement with the plaintiffs' observation that, especially with respect to Title II, their facial challenges to BCRA's provisions are based upon established First Amendment jurisprudence in the campaign finance realm. *See, e.g.*, McConnell Br. at 44 ("[T]his [c]ourt need not go beyond *Buckley v. Valeo* to determine that Title II cannot possibly stand under the First Amendment."). Accordingly, I believe the constitutional challenges discussed in Part IV can be resolved even without extensive reference to the record. Nonetheless, in recognition of the fact that the Supreme Court may see things differently and may indeed revisit established jurisprudence, I offer the following set of findings—as an



alternative to those of the majority—based on my view of the record as a whole.[55]

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[55] To be clear, I do not join in the *per curiam* statement of facts, nor do I join the factual findings set forth in the other opinions. This does not mean, however, that the filing of an alternative set of findings is necessarily for naught. While the Supreme Court made clear as recently as two years ago that it will review a three-judge district court's factual findings for "clear error" only, it reversed the three-judge court's findings in that case because "on the entire evidence" it was "left with the definite and firm conviction that a mistake ha[d] been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quotation omitted).

The majority's view of the factual record—not to mention the record's legal significance—is quite different from mine, leaving me "with the definite and firm conviction that a mistake has been committed" with respect to several of its findings. *See, e.g.*, Memo Op., CKK, Finding 2.13 ("[I]t is entirely possible to distinguish pure issue advocacy from candidate-centered issue advocacy . . . ."); Memo. Op., RJL, Finding 292 ("[G]enuine issue advertisements are less likely to refer to a federal candidate by name."); *see also, e.g.*, Memo. Op., CKK, Findings 1.82-1.83 ("The immense quantity of testimonial and documentary evidence in the record demonstrates that large nonfederal contributions provide donors special access to influence federal lawmakers. . . . [I]t is clear that large donations, particularly unlimited nonfederal contributions, have corrupted the political system. The record [also] demonstrates that . . . [l]arge donations made by groups or persons with an interest in pending legislative activity . . . create an appearance of corruption."); Memo. Op., RJL, Finding 250 ("The defendants have offered substantial evidence that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of . . . influence with . . . the officeholders of that party . . . ."). If the Supreme Court concludes as it did in *Easley* that the majority's "key findings are mistaken," *Easley*, 532 U.S. at 243, it may be helpful for the Court to have an alternative set of findings that reads as a cohesive whole. I note that several factors common to *Easley* and the consolidated actions before us suggest the Court may be more willing here than in the normal case to undertake an "extensive review" of the record and to set aside findings with which it disagrees:

> Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not "lightly overturn" the concurrent

## 1. The Litigants

As to the litigants in the consolidated actions before us,[56] I would find that:

1. Senator Mitch McConnell is the senior United States Senator from Kentucky and is a member of the Republican Party. He has long been active in the Republican Party at the national, state and local levels. He was first elected in 1984 and was reelected in 1990, 1996 and 2002. *See* McConnell Aff. at 1-3.

2. The National Rifle Association (NRA) is a non-partisan, tax-exempt organization governed by section 501(c)(4) of the Internal Revenue Code. It is dedicated

findings of the two lower courts. *E.g.*, *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972). But in this instance there is no intermediate court, and we are the only court of review. Moreover, the trial here at issue was not lengthy and the key evidence consisted primarily of documents and expert testimony. . . . Accordingly, we find that an extensive review of the District Court's findings, for clear error, is warranted. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500-501 (1984).

*Easley*, 532 U.S. at 242-43. I note as well that an additional factor, absent in *Easley*, may justify an extensive review of the record here—the factfinders are not of one mind. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 68 (1964) (Goldberg, J., dissenting) ("My difficulty with [the Court's] conclusion is that the record does not support [its] treatment of the District Court's finding. The District Court was a three-judge court and the three judges did not agree upon . . . express findings of fact.").

[56] I believe that we lack jurisdiction over the *Adams* plaintiffs' claims. *See infra* Part IV.G. Accordingly, I would make no findings with respect to any of the *Adams* plaintiffs. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869))). Moreover, in the interest of avoiding unnecessary or cumulative findings, I would not make findings of fact with respect to each and every litigant over whose claims the court *does* have jurisdiction.



primarily to defending the rights its members believe are guaranteed by the Second Amendment to the United States Constitution; its principal function is to disseminate information regarding those rights. The NRA has approximately four million members and represents their views on legislative and public policy issues before federal, state and local officials and the general public. *See* LaPierre[57] Decl. at 1; NRA App. at 106 (setting forth NRA bylaws).

3. The NRA Political Victory Fund (NRA PVF) is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of the NRA pursuant to 2 U.S.C. § 441b(b).

4. Bill Pryor is the current Alabama Attorney General and was a candidate for reelection as Alabama Attorney General in 2002. *See* Pryor Decl. at 1.

5. The Libertarian National Committee, Inc. (LNC) is the governing body of the Libertarian Party at the national level. The LNC is a non-profit organization incorporated in the District of Columbia and is governed by section 527 of the Internal Revenue Code. The LNC advocates the principle that all individuals have the right to live in whatever manner they choose so long as they do not forcibly interfere with the right of others to do the same. *See* Dasbach[58] Decl. at 2.

6. The American Civil Liberties Union (ACLU) is a tax-exempt organization incorporated in the District of Columbia and is governed by section 501(c)(4) of the

[57] Wayne LaPierre is the Executive Vice President of the NRA and is responsible for the organization's operations. *See* LaPierre Decl. at 1.

[58] Stephen Dasbach is Senior Advisor and former National Chairman of the LNC. *See* Dasbach Decl. at 1.

Internal Revenue Code. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members "dedicated to the principles of liberty and equality embodied in the Constitution." Romero[59] Decl. at 1.

7. Club for Growth, Inc. is a nationwide membership organization governed by section 527 of the Internal Revenue Code. It is dedicated to advancing, *inter alia*, school choice, overall reduction in government spending, personal investment of social security, tax rate reduction, capital gains tax reduction and estate tax repeal. *See* Keating[60] Decl. at 2.

8. The National Right to Life Committee (NRLC) is a tax-exempt organization incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. The NRLC is a nationwide, non-profit, non- partisan organization with approximately 3,000 local chapters and fifty state affiliates dedicated to "promoting respect for the worth and dignity of all human life from conception to natural death." O'Steen[61] Decl. at 1.

9. The National Right to Life Educational Trust Fund (NRL ETF) is an organization governed by section 501(c)(3) of the Internal Revenue Code. NRL ETF sponsors educational advertising and develops materials detailing "fetal development, abortion's impact on America, and . . . euthanasia." O'Steen Decl. at 3.

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[59] Anthony Romero is the Executive Director of the ACLU and is responsible for the organization's operations, including its legislative activities. *See* Romero Decl. at 1.

[60] David Keating is the Executive Director of Club for Growth and is familiar with the day-to-day operation of the organization. *See* Keating Decl. at 1.

[61] David O'Steen is the Executive Director of the NRLC and is familiar with the day-to-day operation of the organization. *See* O'Steen Decl. at 1.



10. The National Right to Life Political Action Committee is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of the NRLC pursuant to 2 U.S.C. § 441b(b). *See* O'Steen Decl. at 5.

11. Thomas E. McInerney is a U.S. citizen, a Registered voter in the State of New York and a member of and contributor to various Republican Party organizations and committees at the national, state and local levels. *See* McInerney Aff. at 1.

12. Barret Austin O'Brock is a U.S. citizen and a resident of the State of Louisiana. He is 14 years of age and intends to make contributions to federal candidates in future elections, including the 2004 election. *See* O'Brock Decl. at 1.

13. Emily Echols, Hannah and Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are U.S. citizens who range in age from 12 to 16. They intend to seek out and contribute to federal candidates "who represent their views and beliefs on important questions like the right to life of children before birth, and on the size of government." Echols Pls.' Proposed Findings of Fact at 11.

14. The U.S. Chamber of Commerce is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. It is the world's largest not- for-profit business federation, representing over 3,000,000 businesses and business associations. *See* Josten[62] Direct Test. at 1.

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[62] R. Bruce Josten is Executive Vice President for Government Affairs of the U.S. Chamber of Commerce and has supervisory responsibility for the organization's government affairs activities. *See* Josten Direct Test. at 1.

15. The U.S. Chamber Political Action Committee (U.S. Chamber PAC) is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of the Chamber of Commerce pursuant to 2 U.S.C. § 441b(b). U.S. Chamber PAC is funded by contributions voluntarily made by individual Chamber executives, administrative employees, members and their families. *See* Josten Direct Test. at 5.

16. The National Association of Manufacturers (NAM) is the oldest and largest broad-based industrial trade association in the United States. Its membership comprises 14,000 companies and 350 member associations. Like many trade associations, NAM is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. *See* Huard[63] Direct Test. at 1.

17. Associated Builders and Contractors, Inc. (ABCI) is a non-profit tax-exempt organization governed by section 501(c)(6) of the Internal Revenue Code and is funded primarily by membership dues. It is a national trade association representing more than 23,000 contractors and related firms in the construction industry. ABCI's members, which include both union and non-union employers, "share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation." Monroe[64] Direct Test. at 1-2.

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[63] Paul Huard is NAM's Senior Vice President for Finance and Administration and has served as the organization's chief lobbyist. *See* Huard Direct Test. at 1.

[64] Edward Monroe is Director of Political Affairs for ABCI and also serves as Treasurer of ABC PAC. *See* Monroe Direct Test. at 1.



18. Associated Builders and Contractors Political Action Committee (ABC PAC) is a political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of ABCI pursuant to 2 U.S.C. § 441b(b). ABC PAC makes contributions to federal candidates who support the principles of ABCI and makes independent expenditures for communications on their behalf. *See* Monroe Direct Test. at 9.

19. The National Association of Broadcasters (NAB) is a non-profit, incorporated trade association of radio and television stations and broadcasting networks in the United States. *See* Goodman[65] Decl. at 2.

20. The AFL-CIO is a national labor federation comprised of 66 national and international labor unions that, collectively, have a total of approximately 13 million members. The AFL-CIO also includes 51 state labor federations, nearly 580 area and central labor councils and numerous trade and industrial departments. A core mission of the AFL-CIO is to provide "an effective political voice to workers on public issues that affect their lives." G. Shea[66] Decl. at 2-3.

21. The Republican National Committee (RNC) is an unincorporated association headquartered in Washington, D.C. It consists of three members each from the Republican Party in each of the fifty States, the District of Columbia, Puerto Rico, American Somoa, Guam and

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[65] Jack Goodman is Senior Vice President and General Counsel of the NAB and is involved in developing the organization's regulatory and policy objectives. *See* Goodman Decl. at 1-2.

[66] Gerald Shea serves as Assistant for Government Affairs to the President of the AFL-CIO and, as such, is responsible for oversight and coordination of all of the AFL-CIO's policy-related activities. *See* G. Shea Decl. at 2.

the U.S. Virgin Islands. Each state and territorial Republican Party elects a national committeeman and anational committeewoman. In addition, the state and territorial Republican Party chairmen serve as members of the RNC. *See* Josefiak[67] Decl. at 4; Duncan Decl. at 3.

22. Mike Duncan is a member of the RNC from the State of Kentucky and currently serves as the General Counsel of the RNC. Prior to becoming General Counsel, he was Treasurer of the RNC and in that capacity signed all RNC reports filed with the FEC. *See* Duncan Decl. at 3. In both his official capacity as an officer of the RNC and his private capacity, Duncan has participated in and (unless prohibited by BCRA) will continue to participate in national, state and local political party activities. He will also (unless prohibited by BCRA) continue to solicit, receive or direct non-federal funds to other persons. *See id.* at 3-6.

23. The Republican Party of New Mexico is a state committee of the Republican Party under BCRA. It supports federal, state and local candidates for office in New Mexico and promotes Republican positions on public policy issues. *See* Dendahl[68] Decl. at 1. Under New Mexico law, the Republican Party of New Mexico is permitted to raise and spend corporate, labor union and individual funds in unlimited amounts in support of

[67] Thomas Josefiak is Chief Counsel of the RNC and is primarily responsible for the day-to-day legal operations of the RNC, including ensuring that all of the RNC's activities, officers and employees comply with applicable federal and state election laws. *See* Josefiak Decl. at 1-2.

[68] John Dendahl is the State Chairman of the Republican Party of New Mexico and is responsible for recruiting and supporting federal, state and local candidates in the State and for raising funds to support the state committee's operations. *See* Dendahl Decl. at 1.



state and local candidates. *See* N.M. STAT. ANN. §§ 1-19-25 to 1-19-36 (1978); *see also* Dendahl Decl. at 2.

24. The Dallas County (Iowa) Republican County Central Committee is a local political party committee the FEC has deemed independent of any state or national political party committee. It is actively involved in supporting state and local candidates for office in Iowa. *See* Josefiak Decl. at 5.

25. The California Democratic Party is an unincorporated association of approximately seven million members and is the authorized Democratic Party of the State of California. Similarly, the California Republican Party is an unincorporated association of over five million members and is the authorized Republican Party of the State of California. The CDP and the CRP perform many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote activities and generic party-building activities; and maintaining an administrative staff and structure to support the parties' goals and activities and to comply with extensive federal and state regulation. *See* Bowler[69] Decl. at 2-3; Morgan Aff. at 2-3.

a. Pursuant to state law, the CDP is governed by the Democratic State Central Committee (DSCC). The DSCC is made up of approximately 2,710 members, about 849 of whom are elected by the 58 county central committees. Other members serve on the

[69] Kathleen Bowler is the Executive Director of the CDP and oversees the day-to-day administrative operations of the organization. *See* Bowler Decl. at 1-2.

DSCC in their capacities as federal or state officials, as nominees of the CDP, as members of the Democratic National Committee (DNC) from California or as elected representatives of 80 Assembly District Committees (AD Committees). *See* Bowler Decl. at 2-3. CDP bylaws provide for local party AD Committees, which elect delegates to the DSCC and are the district-level organizational blocks of the CDP. The AD Committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *See id.* at 3.

b. The CRP is governed by the Republican State Central Committee (RSCC). The RSCC consists of about 1,500 regular and appointive members. The regular members include federal and state officeholders as well as the CRP's nominees for governor, seven other state constitutional offices, United States Senate, 53 congressional districts, 40 state senate districts, 80 state assembly districts and four state board of equalization districts. The RSCC also includes the chairmen of the 58 county central committees and the chairmen of volunteer party organizations. *See* Morgan Aff. at 3-5. The CRP operates as well through (1) a 100-member Executive Committee, which includes federal and state officeholders and 16 representatives of county central committees; and (2) a 25-member Board of Directors, which includes a Member of the Congress[70] appointed by the delegation, three state elected officeholders and representatives from an association of Republican county

[70] As it is used in these alternative findings and throughout this opinion, the term "Members of the Congress" includes both United States Representatives and United States Senators.



central committee chairmen. *See id.* at 3-4. Under the CRP's bylaws and the RNC's rules, the CRP is part of the RNC. The CRP's elected chairman is a member of the RNC. The CRP elects two other representatives to the RNC—a national committeeman and national committeewoman, each of whom is a member of the CRP Executive Committee and Board of Directors. *See id.* at 5-6.

26. Art Torres is the elected Chair of the CDP. Torres also serves on the DNC and has been elected by the DNC to serve on the DNC Executive Committee. As Chair of the CDP, Torres assists the CDP and county central committees in fundraising efforts by meeting and talking regularly with potential donors and attending fundraising events. *See* Bowler Decl. at 4; Torres Decl. at 1-2.

27. The Yolo County Democratic Central Committee and Santa Cruz County Republican Central Committee are two of the 58 county central committees authorized and governed by the California Elections Code. Members of the county central committees are elected at each statewide primary election. All members of the CDP who are also state senators, members of the state assembly or Members of the Congress serve as *ex officio* members of their respective county central committees. *See* Bowler Decl. at 3. The county central committees are primarily involved in local voter registration, get-out-the-vote activities and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *See id.*

28. Timothy J. Morgan is (1) a member of the RNC; (2) a member of the CRP Executive Committee; (3) a member of the CRP Board of Directors; and (4) Chairman of the Santa Cruz County Republican Central Committee. *See* Morgan Aff. at 1.

29. The FEC is a government agency headquartered in Washington, D.C., constituted pursuant to FECA, 2 U.S.C. § 437c, and charged with enforcing the Act as amended by BCRA.

30. The United States, through the DOJ, is charged with enforcing the criminal provisions of the Act as amended by BCRA.

31. The FCC is a government agency headquartered in Washington, D.C., and is charged with enforcing the FCA as amended by BCRA.

32. The intervenors are Members of the Congress who were principal sponsors and authors of BCRA. Senator John McCain is a Republican United States Senator from the State of Arizona. Senator Russell Feingold is a Democratic United States Senator from the State of Wisconsin. Senators McCain and Feingold face reelection in 2004. Senator Olympia Snowe is a Republican United States Senator from the State of Maine. Senator James Jeffords is an Independent United States Senator from the State of Vermont. Senators Snowe and Jeffords face reelection in 2006. Congressman Christopher Shays is a Republican member of the House of Representatives from the 4th Congressional District in Connecticut. Congressman Martin Meehan is a Democratic member of the House of Representatives from the 5th Congressional District in Massachusetts.

### 2. The Ban on Corporate and Labor Disbursements for "Electioneering Communications" and the Disclosure and Reporting Requirements

As to BCRA's ban on corporate and labor disbursements for "electioneering communications" and the statute's disclosure and reporting requirements, *see generally supra* Parts II.A and II.B, I would find that:



33. After the *Buckley* decision in 1976 and subsequent amendments to the Act, the Act's prohibition on the use of corporate and union treasury money and its disclosure requirements applied to independent political spending only if it funded express advocacy of the election or defeat of a clearly identified candidate. *See* 2 U.S.C. § 431(17).

34. Few candidate or party advertisements use words of express advocacy. In the 1998 election cycle only four per cent of ads sponsored by candidates used words of express advocacy. In 2000 only 11.4 per cent of ads sponsored by candidates and only 2.2 per cent of ads sponsored by political parties used words of express advocacy. *See* Krasno[71] & Sorauf [72] Expert Report at 53; Goldstein[73] Expert Report at 16, 31.

35. Before BCRA was enacted, interest groups[74] running issue advertisements[75] often did not disclose the

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[71] Defense expert Jonathan Krasno is a visiting fellow at Yale University's Institution for Social and Policy Studies.

[72] Defense expert Frank Sorauf is Regents' Professor Emeritus at the University of Minnesota.

[73] Defense expert Kenneth Goldstein is an Associate Professor of Political Science at the University of Wisconsin-Madison, where he specializes in the study of interest groups and political advertising. *See* Goldstein Expert Report at 1.

[74] As it is used in these alternative findings and throughout this opinion, the term "interest group" refers to any person or entity—whether a corporation, union, trade association, advocacy group or the like (but not a political party)—that (1) is interested in a particular issue; (2) participates in the political process; and (3) associates with others of like mind. *See infra* Finding 79 at pages 176-80.

[75] As they are used in these alternative findings and throughout this opinion, the terms "issue advertisement" and "issue ad" are interchangeable and refer to an advertisement that does not contain words of express advocacy. *See Buckley*, 424 U.S. at 44 n.52 (express words of advocacy include "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

sources of their funding. *See* Krasno & Sorauf Expert Report at 72; Magleby[76] Expert Report at 18-19. Among the groups that did not disclose their sources was Citizens for Better Medicare, which is funded by the pharmaceutical industry. In 1999 and 2000 Citizens for Better Medicare was one of the top sponsors of issue advertisements that also name federal candidates; it spent approximately $65 million on television advertising during that period. *See* Magleby Expert Report at 18-19; Ryan[77] Dep. at 13-15.

36. From 1996 to 2000 the majority of advertisements run by interest groups were not regulated by the Act because they did not use words of express advocacy. By 2000, for every interest group ad covered by the Act, 20 interest group ads mentioning federal candidates were not covered. *See* Krasno & Sorauf Expert Report at 53; Goldstein Expert Report at 10; ANNENBERG PUBLIC POLICY CENTER, ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE 12-15 (2000) (hereinafter ANNENBERG STUDY).

37. From 1996 to 2000 the number of issue advertisements—as well as the number of organizations sponsoring issue ads and the amounts spent on issue advocacy—increased.

a. In the 1996 election cycle a total of approximately $135 million to $150 million was spent on

[76] Defense expert David Magleby is a Distinguished Professor of Political Science at Brigham Young University, where he also serves as Dean of the College of Family, Home and Social Sciences and as Director of the Center for the Study of Elections and Democracy. *See* Magleby Expert Report at 7.

[77] Timothy Ryan currently serves as Vice President for Advertising at Sawyer Miller Weber Shandwick, an advertising firm in Washington, D.C., and was formerly Executive Director of Citizens for Better Medicare. *See* Ryan Dep. at 6-7.



national and local television and radio broadcasts of about 100 distinct ads on national issues sponsored by relatively few organizations. In the 1998 election cycle approximately 77 organizations aired 423 distinct ads at a cost of between $250 million and $341 million. In the 2000 election cycle approximately 130 organizations aired over 1,100 distinct ads at a cost of more than $500 million. In the 2000 cycle the Republican and Democratic parties accounted for almost $162 million (32 per cent) of the spending on issue advocacy; Citizens for Better Medicare accounted for $65 million (13 per cent); the Coalition to Protect America's Health Care accounted for $30 million (six per cent); the Chamber of Commerce accounted for $25.5 million (five per cent); and U.S. Term Limits accounted for $20 million (four per cent). *See* ANNENBERG STUDY at 1, 4.

b. By way of comparison, a total of approximately $100 million was spent in 1995 alone to advertise syndicated reruns of "Seinfeld," a television sitcom. *See* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 42 & n.4 (2001).

38. In some competitive races, interest group issue advocacy often rivals and even outpaces advertising by federal candidates themselves. *See* Krasno & Sorauf Expert Report at 51; Goldstein Expert Report at 12, 22; Magleby Expert Report at 20, 22.

39. Many of the interest group issue ads that also name a federal candidate and air near an election avoid using words of express advocacy but end with an exhortation to "call" the named candidate and "tell" him something or "thank" him for his stance on a particular issue. *See, e.g.*, Magleby Expert Report at App. G. Both the Chamber of Commerce and the AFL-CIO agree that

"the ultimate way to tell an elective official to do something is through the voting process." G. Shea Dep. at 46; *see* Josten Dep. at 230.

a. Republican political consultant Rocky Pennington testified that "[t]he usual final tag line [of an issue ad] is to 'call' or 'ask' or 'tell' a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine thousands of people calling the candidate in response to the ad and saying, keep doing this, this is wonderful." Pennington Decl. at 6. Senator Feingold testified similarly, stating that the plea to "call somebody's office" is at "the heart of the phony issue ad." Feingold Dep. at 14. Senator Feingold acknowledged, however, that his constituents often do contact him in response to television advertisements. *See id.* at 238-39.

b. In 1996 Citizens for Reform, an interest group, spent $2 million on television issue ads that did not expressly advocate the election or defeat of any candidate but were directed at influencing congressional races. That year it sponsored the notorious "Bill Yellowtail" ad, which aired during the final weeks of a Montana congressional race and accused Yellowtail, the challenger, of spousal abuse: "He preaches family values but he took a swing at his wife." Thompson Comm. Rep. at 6301-05. In addition to its television and radio ads opposing Yellowtail, Citizens for Reform "did direct mail and phone banking against [him]," which would not be prohibited by BCRA. Lamson[78] Decl. at 3.

[78] Joe Lamson managed Bill Yellowtail's 1996 campaign. *See* Lamson Decl. at 1.



c. The NAB "admits that a [p]olitical [a]dvertisement might conceivably influence a federal election without the use of any particular words as might many other factors depending upon the circumstances of each individual race." Resp. of NAB to FEC's First Reqs. for Admis. at 5.

d. Republican political consultant Douglas Bailey testified that "[i]n the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.' . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians." Bailey Decl. at 1-2.

40. Interest group issue advertisements that air near election time more frequently refer to federal candidates than do interest group ads that air at all other times. For example, from January 1, 2000 until September 4, 2000 Citizens for Better Medicare sponsored 28,867 television ad spots, none of which named a federal candidate. *See* Goldstein Expert Report at App. A & Tbl. 17A. During the three weeks preceding the 2000 election, by contrast, Citizens for Better Medicare sponsored 6,000 ad spots that identified a federal candidate. *See id.*

41. Beginning in 1996 corporations, unions and interest groups—to which the defendants refer as "outside groups," *e.g.*, Intervenors Proposed Findings of Fact at 31—began large-scale use of their treasury funds to sponsor issue advertisements that to some observers "looked and sounded like campaign ads," *id.* (citing ANNENBERG STUDY at 3, 7-8; Thompson Comm. Rep. at 5927 & n.4).

42. Issue advertisements are heavily concentrated in the final weeks leading up to an election and are often intensely partisan. They are concentrated most heavily in jurisdictions with competitive election contests—commonly known as "battleground states"—where a small change in voter preference can affect the outcome of the election. Interest groups often broadcast ads in competitive contests where their investment is most likely to make a difference. *See* Goldstein Expert Report at 21 Tbl. 5; Magleby Expert Report at 20, 31 ("Interest groups . . . take aim at particular states with competitive U.S. Senate races or congressional districts where the outcome is in doubt. . . . This tendency has been reinforced by the exceedingly close margin of party control in Congress in recent years."); LaPierre Dep. at 24-25, 118, 157-59. The following subparagraphs contain representative examples of such ads.

a. During the 60 days leading up to the 2000 general election the NRA ran a 30-minute infomerical known as "Union/Gore" which would constitute an "electioneering communication" under BCRA. The infomercial opened with NRA President Charlton Heston stating that "[t]his election could come down to battleground states like Pennsylvania, Michigan, Ohio and Missouri, states with lots of union members where the union vote could decide the outcome. But not all union members will vote as political observers might expect. So we sent NRA correspondent Ginny Simone deep into the heart of union country to talk with union members about this election, about the candidates, about the issues, and what to them really matters most. Here's Ginny's report." The infomercial then focused on union members' comments in response to the NRA reporter's questions:

• "All this union leadership, they send you stuff all the time [telling you to] vote for Al Gore. Well,



I don't see it that way. It's —you know, I—I want my freedom, I want to hold onto my guns, I want to vote for Bush."

• "I have a hand gun, and I've had NRA training, and I'm a survivor of domestic violence, and I believe in self-protection, and I do not want my guns taken away."

• "A loss of my gun rights is what Al Gore represents. There's no ifs, ands, or buts about that. In my mind, . . . if Al Gore and his administration is [sic] voted in, we will lose firearm rights."

• "Yes, it's nice being part of my union, it helps protect me. But having my right to bear arms is something that's extremely important to me. It's something that's kind of just been engrained [sic] in me."

The infomerical then turned back to Heston, who urged voters "to protect your freedoms on November 7th. It's one way you can thank the many souls sacrificed in freedom's name over the past couple hundred years. . . . And that includes carefully considering which candidates promise to defend our freedoms and which candidates promise to diminish or even destroy them." McQueen Dep. at 113-23.

b. During the 60 days leading up to the 2000 general election the interest group Planned Parenthood aired an ad called "Bush Doesn't Say Much," which under BCRA is an "electioneering communication." The ad claimed that "[a]s President, Bush could appoint Supreme Court Justices who could take away our right to choose. Get the facts about George W. Bush's Texas record." Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 29).

c. During the 60 days leading up to the 2000 general election the interest group Handgun Control Inc. ran an ad called "Handgun/Martin Sheen," an "electioneering communication" under BCRA. Actor Martin Sheen stated in the ad that "[b]etween now and election day, at least two thousand Americans will die from gunfire. Should the next president be a candidate of the gun lobby? Should he have signed a bill that allows hidden handguns in churches, hospitals, and amusement parks? ... That's Governor Bush's record. Find out more at bushandguns.com." Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 32).

d. RNC political operations director Terry Nelson testified that, as a general rule, issue advocacy is not as effective in August of an election year as it is in October or early November. *See* Nelson Dep. at 90-91 ("I would tell candidates that they needed to spend their money when people are paying attention, which tends to be towards the election.").

e. The 2000 United States Senate race between Spencer Abraham and Debbie Stabenow is illustrative of recent issue advocacy campaigns across the country.

1) During the 60 days preceding the general senatorial election between Abraham and Stabenow interest groups aired 4,323 ad spots. During the other ten months of the year the groups aired only 926 ad spots, for a year-long total of 5,249 ad spots.

2) By way of comparison, Abraham and Stabenow themselves ran (together) a total of 11,381 ad spots during the year 2000 and the political parties ran 7,905 ad spots in the same period.

3) The AFL-CIO ran one ad critical of Abraham 269 times from October 16 to October 22. On



October 20 the ad aired 26 times in Detroit and 29 times each in the markets of Grand Rapids, Battle Creek and Kalamazoo. The Michigan and U.S. Chambers of Commerce ran five distinct ads against Stabenow a total of 1,635 times between September 20 and November 6.

4) During the 60 days preceding the general election not a single candidate- sponsored ad and only one party-sponsored ad (accounting for ten per cent of party ad airings during that period of time) employed words of express advocacy. The issue ads regularly criticized Abraham and Stabenow for votes they had taken in the past and did not focus heavily on forthcoming legislative initiatives. *See* Intervenors Proposed Findings of Fact at 37-38.

5) A Michigan Chamber of Commerce issue ad entitled "Stabenow Against Local Schools"—now an "electioneering communication" under BCRA—stated: "Local schools, local teachers, local parents electing local school boards. That is the way our schools work best. So why did Debbie Stabenow vote against a bi- partisan plan to make our schools better? To reduce federal red tape and increase student performance in five years? Why did she vote against allowing teachers to control their own classrooms? ... Call Debbie Stabenow and tell her we want to run our own neighborhood schools." Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 6).

43. No credible evidence in the record supports the defendants' assertion that BCRA's "electioneering communication" provisions will affect "very few genuine discussions of policy matters." *E.g.*, FEC's Am. Proposed Findings of Fact at 153. To the contrary, credible record evidence indicates that BCRA will

actually capture a *vast* number of "genuine" issue advertisements. *See, e.g., infra* Findings 43f-43h, 51d at pages 90-99, 109.

a. The Brennan Center for Justice (Brennan Center) played a "central role" in the adoption of BCRA. Holman[79] Dep. at 14-15, Exh. 3. The Brennan Center helped "craft the design of the McCain-Feingold bill," *id.* at 11, and provided "legal opinions" on what it believed would be "constitutionally defensible," *id.* at 13.

b. The Brennan Center promoted campaign finance regulation by, *inter alia:* drafting for legislators memoranda that "directly addressed concerns that were being debated in the Congress concerning the McCain-Feingold and Shays-Meehan bills," *id.* at 11; meeting with Members of the Congress to review research findings, *see id.* at 16-17; drafting and publishing a "scholars' letter" and a signed statement by former leadership figures of the ACLU, which documents deemed the bills constitutional and were "very influential in the Senate debate and in influencing media perceptions," *id.* at 11, 12, 19-20, Exh. 3.

c. In addition to undertaking these wide-ranging activities in support of new campaign finance regulation, the Brennan Center published two reports: CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (Brennan Center 2001) (hereinafter *Buying Time 2000*), and JONATHAN S. KRASNO & DANIEL E.

[79] Craig Holman was a senior policy analyst at the Brennan Center and the principal co-author of *Buying Time 2000. See* Holman Dep. at 8; *see also infra* Finding 43c at pages 87-88.



SELTZ, BUYING TIME 1998: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (Brennan Center 2000) (hereinafter *Buying Time 1998*). *See generally* Defs.' Exhs. Vols. 46, 47.

d. The *Buying Time* reports were based on data gathered by Kenneth Goldstein with the help of his political science students at Arizona State University (for the 1998 report) and the University of Wisconsin (for the 2000 report). Goldstein's students were shown "storyboards"—prepared by the Campaign Media Analysis Group (CMAG)—of certain political advertisements broadcast during 1998 and 2000. The students were asked to "code" the ads based on their content. *See* Defs.' Exhs. Vol. 46 at 19; Defs.' Exhs. Vol. 47 at 7. According to the Brennan Center, the *Buying Time* reports were "the central piece of evidence marshaled by defenders of" BCRA's electioneering communication provisions "in support of [their] constitutional validity." Holman Dep. Exh. 3 at 2. While the government claims that "[t]he *Buying Time* databases show that ... BCRA will correctly capture" almost all so-called "sham" issue advertisements "but very few genuine issue advertisements," FEC's Am. Proposed Findings of Fact at 192, the *Buying Time* reports are flawed. *See infra* Findings 43e-43h at pages 88-99.

e. The Brennan Center and the authors of the *Buying Time* reports sought to achieve a certain result and therefore sacrificed scientific objectivity.

1) Funds to underwrite *Buying Time 1998* were solicited on the basis of the explicit promise that the study would be abandoned midstream if the results being obtained were not helpful to the cause for more stringent campaign finance regulation. *See*

Goldstein Dep. Exh. 2 at 6 ("Whether we proceed . . . will depend on the judgment of whether the data provide a sufficiently powerful boost to the reform movement."). Money to fund *Buying Time 2000* was solicited on the promise that the study would be "design[ed] and execute[d]'' to achieve "reform" and the study was so designed and executed. Goldstein Dep. (Vol. 1) at 37-38 ("Q: So I take it that it was your goal to design and execute the study in a way that would help move the campaign reform ball forward: is that right?" "A: Yes.").

2) The Brennan Center submitted a grant proposal to the Pew Charitable Trusts (Pew) to gain funding for *Buying Time 1998* and, later, *Buying Time 2000*. *See* Krasno Dep. at 51, 55-56, Exh. 4. The Brennan Center understood that Pew's "bottom line" was "regulating sham issue advocacy." *Id.* at 52-53, Exh. 3. Most of the funding Pew subsequently agreed to provide was to be put toward publicity and advocating "reform" rather than purchasing and analyzing data. *See id.* at 63-64, Exh. 5.

3) The grant proposal to Pew was authored by Jonathan Krasno, who—before he had approached Pew or had performed any studies—had already "come to believe that political parties were using the magic words test as cover to sponsor thinly-veiled campaign ads masquerading as issue advocacy." Krasno Dep. at 66, Exh. 6, Exh. 13 at 2.

4) Each element of the Brennan Center's grant proposal to Pew was aimed at "overcoming the obstacles to reform" and at "influencing at least one of the four critical audiences that [would] play a pivotal role in determining the success or failure of any reform: Legislators, journalists, academics and



courts." Holman Dep. Exh. 4 at 2-3; *see id.* ("[T]he purpose of our acquiring the data is not simply to advance knowledge for its own sake, but to fuel a continuous and multi-faceted campaign to propel reform forward."). According to the proposal, the Brennan Center planned to implement the 1998 study in two "phases," during the first of which the Center would "acquire" the data and "adapt it so that it might be easily used" to "develop a strategy for responding to the threat posed by issue advocacy." Goldstein Dep. Exh. 2 at 3.

f. *Buying Time 1998* miscalculates the percentage of so-called "genuine" issue advertisements that would have been regulated in 1998 by a statute like BCRA.

1) The key question included in the 1998 study was Question 6,[80] which asked coders: "In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?"[81] Defs.' Exhs. Vol. 47 at 193 (emphasis in original); *see* Seltz [82] Dep. at 184-85. If coders concluded that an ad provided information about or urged action on a bill or issue, the ad was to be coded as a "genuine" issue ad. If the coders concluded that the ad

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[80] Question 6 was not included in the original coding protocol that was pre-tested before the study began. *See* Goldstein Dep. (Vol. 2) at 29, Exh. 11; Krasno Dep. at 115. Krasno added the question to the coding protocol in an attempt to help student coders "avoid confusion" on subsequent questions. Krasno Dep. at 116-17, 121.

[81] The words "particular candidate" were printed in boldface type because the authors "wanted [students] to be thinking of candidates" when answering the question. Krasno Dep. at 122-23.

[82] Daniel Seltz was a research associate and later a project coordinator in the Democracy Program at the Brennan Center in the late 1990s; during that time he co-authored *Buying Time 1998*. *See* Seltz Dep. at 4-5; *see also supra* Finding 43c at pages 87-88.

generated support for or opposition to a particular candidate, the ad was to be coded as a "sham" issue ad.

2) The authors of *Buying Time 1998* claimed that just seven per cent of "genuine" issue advertisements aired during 1998 would be regulated by a statute like BCRA. In arriving at this figure, the authors counted as "genuine" only two ads in the source database. *See* Seltz Dep. at 77-80, 101-02, Exh. 1 at 109-110, Exh. 4; Krasno Dep. at 149-50; Holman Dep. at 51-52, Exh. 6.

3) Joshua Rosenkranz, Executive Director of the Brennan Center, testified before the Congress in April 2000 and highlighted the seven per cent figure. He asserted that "[w]ith solid empirical data of this type, Congress can be confident that the major campaign finance reform proposals currently before it do not inhibit true issue advocacy." Holman Dep. Exh. 25 at 5 (Rosenkranz testimony). In January 2001, however, Rosenkranz discovered the seven per cent figure to be "flat out false." *Id.* Exh. 28 (e-mail from Rosenkranz); *see id.* Exh. 27 (e-mail from Holman stating that "[w]hile only 7% of groups placing genuine issue ads would be captured, those groups bought about 40% of all issue ads within [60 days of the 1998 general election]. So, in reality, according to the 1998 database, about 40% of genuine issue ads would be deemed electioneering within a 60-day regulatory period."); *id.* Exh. 29 (e-mail from McLoughlin[83] stating the seven per cent finding was "either false or so vague as to mislead the reader"); *id.* Exh. 31 (subsequent e-mail from McLoughlin reporting correct percentage to be 11.38 per cent); *id.* Exh. 36 (subsequent memo from Holman reporting correct percentage to be 13.8 per cent).

[83] Luke McLoughlin, now a first-year law student, was a research associate in the Democracy Program at the Brennan Center from 2000 to 2002 and during that time co-authored *Buying Time 2000*. *See* McLoughlin Dep. at 3-6; *see also supra* Finding 43c at pages 87-88.



4) Craig Holman, a co-author of *Buying Time 2000*, "decided that since *Buying Time* [was] already published and distributed," he would not "rekindle the issue" even though he had concluded that "[t]here was no mistake in the reassessment" that the seven per cent figure was false. *Id.* Exh. 30.

5) Although the Brennan Center now claims that it "is sticking by the 7 percent figure," *id.* at 142, Holman apparently still believes that 13.8 per cent is the correct percentage "with respect to airings," *id.* at 155-56; *see also id.* at 154 (stating that authors of *Buying Time 1998* should have been clear "whether [the study was] referring to airings or unique ads").

6) According to two of the defendants' experts, if the formula used by the Brennan Center in *Buying Time 2000* had been applied to the data underlying *Buying Time 1998*, the *Buying Time 1998* study would have reported that the percentage of "genuine" 1998 issue ads that would be regulated by BCRA was 14.7 per cent. *See* Krasno & Sorauf Expert Report at 60 n.143.

7) Goldstein's students originally coded as "genuine" at least eight of the ads the Brennan Center later counted as "sham" issue ads in *Buying Time 1998*. Analysis of the handwritten student coding sheets—produced pursuant to a subpoena issued to Goldstein—demonstrates that the students determined that the eight ads "provide[d] information about or urge[d] action on a bill or issue." Goldstein Dep. (Vol. 2) at 65-69 & Exhs. 19-21, 78-79 & Exhs. 22-23; 79-80 & Exhs. 24-25, 80-82 & Exhs. 26-27, 83 & Exhs. 28-29, 84-85 & Exhs. 30- 32, 85-87 & Exhs. 33-35, 87-88 & Exhs. 36-37.

8) According to one of the plaintiffs' experts, James Gibson,[84] *Buying Time 1998* would have shown—if the students'

[84] Plaintiffs' expert Gibson is the Sidney W. Souers Professor of Government at Washington University. *See* Gibson Expert Report, Exh. 2.

original codings had not been disregarded—that 64 per cent of all group-sponsored issue ads aired during the last 60 days of the 1998 election were "genuine" and would have been covered by BCRA. *See* Gibson Expert Report at 42-43.

9) Although the defendants' experts filed three rebuttal reports in response to Gibson's expert report, none challenged his 64 per cent finding. In his rebuttal expert report, Gibson reconsidered his analysis using the methodology used in Krasno's expert report. *See* Gibson Rebuttal Report at 23. Crediting the students' judgments once again, Gibson concluded that no less (and likely more) than 50.5 per cent of "genuine" issue ads aired within 60 days of the 1998 general election would have been regulated by BCRA. *See id.*

g. Like *Buying Time 1998, Buying Time 2000* is based on a flawed methodology and is therefore unreliable as evidence of how many "genuine" 2000 issue advertisements would have been regulated by BCRA.

1) The authors of *Buying Time 2000* concluded that only three "genuine" issue ads in the 2000 database—numbers 627, 1389 and 2862—would have been "unfairly caught by [BCRA]'' in the 2000 election season. Holman Dep. at 89-90, Exh. 18.

2) But at least six distinct ads were originally coded as "genuine" by the student coders for *Buying Time 2000*. *See* Goldstein Dep. (Vol. 2) at 126-27; Goldstein Expert Report at 26 n.21. These included numbers 627, 1389 and 2862 and three others as well. *See* Goldstein Dep. (Vol. 2) at 131-33; Goldstein Expert Report at App. J. That is, three of the six ads were changed from being coded as "genuine" issue ads to "sham" ads in the *Buying Time 2000* database. *See* Goldstein Rebuttal Report at 16; Holman Dep. Exh. 15; McLoughlin Dep. at 44, 47-48, Exh. 13. The students' original coding decisions for the 2000 report have not been preserved and Goldstein has no way of determining precisely how each of



the ads was originally coded. *See* Goldstein Dep. (Vol. 2) at 129; Goldstein Rebuttal Report at 16.

3) In March 2001—shortly before *Buying Time 2000* went to press—the Brennan Center called Goldstein on his cell phone at the West Palm Beach airport seeking his judgment on an unknown number of ads aired within 60 days of the 2000 election, all of which were coded by the students as "genuine." After the text of each ad was read to him over the phone, Goldstein overruled the students' judgments and reclassified each ad as an "electioneering" ad. *See* Goldstein Dep. (Vol. 2) at 57-59, 147-150 ("Q: What was the urgency?" "A: I think the book was going to press. . . . Feingold was being debated the next week, and Brennan wanted to be able to write a report. . . . [T]he Brennan Center was trying to get a report out the door around that debate.").

h. Both of the *Buying Time* reports contain additional flaws that further undermine their evidentiary value.

1) As plaintiffs' expert Gibson testified, the 1998 and 2000 databases upon which the *Buying Time* studies are based are "subject to continuous alteration by Professor Goldstein, in consultation with the Brennan Center staff." Gibson Expert Report at 46 ("No documents have been produced that indicate how Professor Goldstein has [exercised] or should exercise his enormous discretionary powers to change or recode the data."). There are approximately 12 versions of databases connected to the *Buying Time* reports. *See* Gibson Dep. at 210. These databases have been repeatedly changed so that "[n]o database has been . . . produced that will generate the specific numbers found in [the *Buying Time* reports]." Gibson Expert Report at 5, 44.

2) *Buying Time 1998*, in particular, is a "fundamentally flawed" study. Gibson Expert Report at 4. Because the study contains little, if any, explanation or analysis of the data upon which it relies, even members of the Brennan Center have

had difficulty understanding it. *See, e.g.*, Holman Dep. at 32 ("To tell the truth, I couldn't understand much of *BuyingTime 1998*."); Krasno Rebuttal Report at 8 (co-author of *Buying Time 1998* acknowledging data set upon which study is based is "maddeningly complex"); Goldstein Dep. Exh. 17 (e-mail from Holman stating "[t]he missing data category is uncomfortably large in the 1998 database").

3) Daniel Seltz, a co-author of the 1998 study, has had little if any training in the methods of quantitative analysis. *See* Seltz Dep. at 8 (Seltz received a B.A. in 1996 in history and East Asian studies); *see also* Gibson Expert Report at 6, 45 (neither 1998 nor 2000 study has been subject to scrutiny of objective peer reviewers and methodology underlying each study "has not been judged to be acceptable by the social scientific community").

4) In each of the studies, student coders were all of a "certain educational level" and "certain age level" and were all "[l]iving in a certain geographical area." Holman Dep. at 228-29. The Brennan Center conceded that the coders were "not representative of the general population" and, therefore, intercoder reliability—i.e., the technique of using multiple respondents to code the same ad "to try to weed out any kind of bias that may be present in one of the coders versus another," *id.* at 189—could at most establish that "this particular group of students roughly of [the same] age roughly of the same educational background living in roughly the same part of the country with contacts to the same professors tend to see things about the same way," *id.* at 228, 232, Exh. 1 at 19.

5) One finding from the *Buying Time* data that was *not* described in the two reports stemmed from a question asking student coders to determine whether the "primary focus" of a particular advertisement was (1) "personal characteristics"; (2) "policy matters"; (3) "both"; or (4) "neither." Gibson Expert Report at 31-32. The students' answers to this question



differed significantly from their answers to Question 6 (in the 1998 study) and Question 11 (in the 2000 study), which asked them to evaluate the "purpose" of a particular ad. In 1998 98.1 per cent of the interest group-sponsored ads broadcast within 60 days of the general election and mentioning a candidate were coded as having policy matters as their "primary focus." *See id.* at 32-33. In 2000 98.7 per cent of the group-sponsored ads broadcast within 60 days of the general election and mentioning a candidate were coded as having policy matters as their "primary focus." *See id.* at 59-60. One defense expert acknowledged—and it would be difficult not to acknowledge—that "a very large percentage of the advertisements . . . had policy issues as their primary focus." Lupia[85] Rebuttal Report at 12. Plaintiffs' expert Gibson concluded that the "primary focus" question was superior to Question 6 of the *Buying Time 1998* study because it included the option "both" and therefore did not force the student coders into an artificial choice between candidate speech and issue speech. *See* Gibson Expert Report at 34; *see also Buckley*, 424 U.S. at 42 ("[T]he distinction between discussion of issues and . . . advocacy of election or defeat of candidates may often dissolve in practical application.").

6) Seltz acknowledged that "many ads both provide information about or urge action on a bill or issue and generate support or opposition for a candidate." Seltz Dep. at 188. Krasno, his co-author, acknowledged that the test established by the Supreme Court in *Buckley* does not distinguish between "candidate-oriented" issue ads and "genuine" or "pure" issue ads. Krasno & Sorauf Expert Report at 58. When asked if he would have designed his studies any differently had he known that speech about *both* candidates and issues was constitutionally protected, Goldstein conceded that he would have. *See* Goldstein Dep. (Vol. 2) at 186-89.

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[85] Defense expert Arthur Lupia is a Professor of Political Science at the University of Michigan. *See* Lupia Rebuttal Report, App. A.

7) The reports' authors and the database's creator cannot seem to agree about what constitutes a "genuine" issue ad and what constitutes a "sham" issue ad. An ad sponsored by the National Pro Life Alliance entitled "Feingold Kohl Abortion 60," which aired within 60 days of the 2000 election, announced that

> America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and exposed [sic] of their newborn baby in a dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant, all but one inch from full birth and then killed him it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl voted to continue this grizzly [sic] procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121.

Defs.' Exhs. Vol. 48, Tab 3 (CMAG Storyboard No. 80). McLoughlin testified that the ad was "genuine" because "[t]he ad's focus is primarily on the issue of partial birth abortion." McLoughlin Dep. at 42. Holman disagreed with his co-author, concluding that the ad was an "electioneering issue ad." Holman Dep. at 67-69. Goldstein—who was so certain in 2000 that the ad was not "genuine" he reversed a student determination that it was—concluded during the course of this litigation that the ad was indeed a "genuine" issue ad. Goldstein Dep. at 135.



44. The ACLU engages in non-partisan political activities designed to influence federal legislation involving civil rights and civil liberties issues of national importance. *See* Romero Decl. at 1.

a. The ACLU has never taken a position in a partisan political election in its 82-year history, although it frequently takes positions on public issues of significance to the organization and its members. *See id.* at 2.

b. As an advocacy organization, the ACLU actively lobbies for its positions and frequently talks with federal officials and candidates about civil liberties issues. Although the ACLU does not endorse or oppose the election of particular candidates, its public statements, member communications and other similar activities frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who often are also candidates for federal office. *See id.*

c. The ACLU regularly publicizes in its membership mailings—and through pamphlets and other publications—the civil liberties voting records, positions and actions of elected officials, all of whom are at some point candidates for federal office. It sends out over 6.7 million pieces of mail each year to its members and potential members. *See id.*

d. The ACLU has never operated a political action committee and has no interest in establishing one. The creation of a political action committee would be inconsistent with the ACLU's mission and identity as a non-partisan organization. Establishing a political action committee would also have adverse consequences for the organization's members. Under FECA political action committees are required to disclose the identities of their contributors. Many ACLU members and con-

tributors seek explicit assurances that their membership will remain confidential and that their contributions will remain anonymous. *See id.* at 2-3.

e. The ACLU is primarily a membership-driven organization. Membership dues are not tax deductible. The basic membership fee is $35, although many members contribute more than that. A reduced membership rate is available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1,000. Although the ACLU does not maintain records on the corporate status of non-individual donors, less than $85,000 of the ACLU's total revenues were contributed by business entities and other organizations in 2001. None of the contributions from businesses exceeded $500. Contributions from non-individual donors represent less than one per cent of the ACLU's total annual funding. *See id.* at 3.

f. Many of the ACLU's public statements involving legislation or executive branch policies—including print and broadcast communications—necessarily refer to clearly identified federal candidates, Members of the Congress or executive branch officials because high profile legislation (like "McCain- Feingold" or "Shays-Meehan") is often publicly identified with its sponsors. Likewise, the ACLU's public statements supporting or opposing the President's policies invariably refer to the President by name. *See* Murphy Decl. at 4.

45. The NRLC regularly pays to broadcast what BCRA defines as "electioneering communications." *See* O'Steen Decl. at 1-2.

a. The primary purpose of the NRLC's electioneering communications is to affect legislation. *See id.* at 3.



b. The NRLC qualifies as an *MCFL*-type organization under the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*. *See* O'Steen Decl. at 2.

c. The NRLC has received donations from political party committees in the past and persons associated with political parties have assisted the NRLC in raising funds. *See id.* at 3.

d. The NRLC strongly supports a partial-birth abortion ban. It helped initiate the Partial-Birth Abortion Ban Act and published numerous print ads, press releases and educational materials in support of the Act and in an effort to override President Clinton's veto. Some of the ads and materials mentioned federal officials and some mentioned President Clinton after April 10, 1996 while he was a candidate for the 1996 presidential election. *See id.* at 7-10, Exhs. A-1 to A-12.

e. The NRLC has a long history of opposing campaign finance legislation like BCRA. *See id.* at 10-21, Exhs. B-1 to B-44.

1) In November 1995 the NRLC sent to all United States Senators a letter opposing newer and stricter campaign finance legislation on grounds that it would "almost entirely eliminate involvement in the political process for ordinary citizens who are not independently wealthy" and would regulate issue advocacy such that groups not organized as political action committees would be unable to inform the public about candidates' positions and voting records. *See id.* at 11.

2) The NRLC has broadcast advertisements in opposition to campaign finance legislation like BCRA. Many such ads mentioned federal candidates and were broadcast within 30 days of a primary or within 60 days of a general election. *See id.* at 15-19, Exhs.

B-14 to B-19, B-21 to B-25, B-27, B-30, B-31, B-33, B- 36 to B-39.

3) In January 2000, when Governor Bush and Senator McCain were seeking the Republican presidential nomination, the NRLC used the national attention focusing on the two candidates to continue its long-term battle against campaign finance legislation like BCRA, just as Senator McCain used the national attention to promote the McCain-Feingold legislation. *See id.* at 19.

46. Common Cause, an interest group not a party to these consolidated actions, has a long history of supporting campaign finance legislation like BCRA.

a. Since its creation in 1970 Common Cause has promoted and supported a strict regulatory regime over campaign finance. *See* Keller[86] Dep. at 17-18. While it has not run electioneering communications in support of campaign finance restrictions, it has engaged in a variety of activities mentioning federal candidates in the weeks leading up to elections. For example, as the 2000 New Hampshire presidential primary approached, Common Cause "staged an event with both Senator McCain and former Senator Bradley around the issue of [c]ampaign [f]inance [r]eform generally," an event at which the candidates were to pledge their support for campaign finance legislation like BCRA. *Id.* at 105. At that time, an opinion editorial published on Common Cause's website extolled Senators McCain and Bradley as presidential candidates who uniquely understood the need for campaign finance reform. *See id.* Exh. 20. The purpose of the editorial "was to raise the visibility of the issue" of campaign finance, not to influence a federal

[86] Matt Keller serves as Common Cause's Legislative Director. *See* Keller Dep. at 7-9.



election. *Id.* at 106. A Common Cause official acknowledged it was "possible" that the editorial influenced the 2000 election but he made clear "that was not [its] intent." *Id.* at 106-07.

b. During the 2000 election season Common Cause financed a number of "Town Hall Meetings" or "Town Hall Forums" in New Hampshire and other States to promote campaign finance legislation. At least one of the events coincided with active primary campaigns. Several other events mentioned Members of the Congress who would be candidates in the general election and, at still others, Members themselves were present. A Common Cause official stated that while the events might have affected the outcome of the 2000 election, their purpose was not to influence any election or to promote or oppose any candidate. *See id.* at 116-17, Exh. 23; *id.* at 132-36, Exh. 30; *id.* at 136-39, Exh. 31; *id.* at 139-42, Exh. 32.

c. Within 30 days of a primary election and while Vice President Gore was a presidential candidate, Common Cause distributed a nationwide press release subtitled "Gore Sets Forth Innovative Plan for Reform." *Id.* at 113-15, Exh. 23. The press release described Gore's proposal as "innovative and promising" and commented that "Gore is again putting forth strong reform proposals in contrast to Governor George W. Bush." *Id.* Exh. 23. Common Cause stated that the purpose of the press release was not to influence the election but to highlight that "yet another candidate for President was making [c]ampaign [f]inance [r]eform a primary issue in his campaign." *Id.* at 115. A Common Cause official did not believe the press release promoted or supported Gore but he acknowledged that the statement "could affect a federal election." *Id.*

d. On October 18, 2000 (shortly before the 2000 general election) Common Cause issued a nationwide press release announcing a "Reform Report Card" that graded Members of the Congress on their support for tighter campaign finance restrictions and listed legislators who had signed a "Public Integrity Pledge," which promised to support campaign finance legislation. *See id.* at 119-21, Exhs. 25-27. While a Common Cause official acknowledged that the press release could be interpreted to promote particular candidates, he stated that the press release's purpose was not to influence any election or to promote any candidate but to "encourage ... Members of Congress to vote for the Shays-Meehan, McCain- Feingold Bill." *Id.* at 122-23.

47. NRL ETF has spent and intends to spend funds on broadcast and print communications that do not refer to a candidate but do (1) appear within 60 days of a general election and (2) discuss issues that are contested and on which the candidates have taken a position. *See* O'Steen Decl. at 4. NRL ETF qualifies as an *MCFL*-type organization under the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*. *See* O'Steen Decl. at 4.

48. NRL PAC regularly enters contracts for independent expenditure communications days, weeks and months in advance of the time the actual expenditures are made. *See id.* at 5.

49. Club for Growth's goal is to help its members identify races to which their contributions—combined with those of many other members—should be sent so that they can influence public policy in accord with the Club's values of economic freedom. *See* Keating Aff. at 3.

a. Club for Growth is involved in the political process in two major ways; it bundles contributions to candidates and it engages in broadcast issue advocacy. *See id.* at 4-5.



b. Club for Growth's television and radio ads do not contain express words of advocacy but identify candidates' positions on tax cuts, tax reform, free-market issues and other economic issues of concern to the Club. *See id.* The Club's ads are frequently broadcast during the 30 days before a primary election and the 60 days before a general election and are intended to educate voters about federal and state candidates' records and platforms. *See id.* at 5-6.

50. The NAB serves and represents the American broadcasting industry and has approximately 7,300 member stations throughout the country. All of the NAB's voting members are broadcast licensees within the meaning of the FCA. *See* Goodman Decl. at 2.

a. The NAB's members broadcast, on television and radio, an extensive number of political advertisements that take positions on issues of public importance. The ads are funded by individuals, groups, labor unions, incorporated entities and others. They often refer to a candidate for federal office and are broadcast in that candidate's district within 60 days of a general election or within 30 days of a primary. Thus, many of the ads fall within BCRA's definition of "electioneering com munication." *See id.* at 3.

b. The NAB's Annual Report and Member Resource Guide and its "Political Broadcast Catechism" publication provide member stations with guidance as to their obligations under the rules of political broadcasting. *See id.* at 2-3, Exhs. 2-3.

c. Although the precise amount of money paid to the NAB's member stations by the sponsors of electioneering communications is not specifically known, NAB members collectively receive millions of dollars every election cycle to air such ads. *See id.* at 3.

d. BCRA section 504 requires the personnel at NAB member stations to make what will often be a difficult and sensitive decision about whether a particular communication relates to a "political matter of national importance," a decision for which station sales personnel are not trained. Section 504 will also materially add to the amount of records NAB members must maintain. *See id.* at 6.

e. NAB members are likely to have difficulty discerning whether a particular communication relates to a "political matter of national importance" and are therefore likely to have difficulty discerning whether and under what circumstances recordkeeping and disclosure are required. *See id.* at 7.

51. The NRA's frequent references to candidates for federal office in the programming it broadcasts throughout the election cycle—including the periods immediately preceding primaries and general elections—are essential to its political mission of educating the public about Second Amendment and related firearm issues. *See* LaPierre Decl. at 1-3. They also enable the NRA to respond directly and effectively to frequent criticism by politicians and the media. *See id.* at 12, 15-17; McQueen[87] Decl. at 9-14; *see also, e.g.*, NRA App. at 223-44 (examples of ads criticizing NRA).

a. The NRA 30-minute news magazine entitled "California" aired more than 800 times in California from August 29, 2000 through November 5, 2000 and 595 of the airings were in one of the nation's top 75 television markets. *See* LaPierre Decl. at 5; NRA App. at 216.

[87] Angus McQueen is the Chief Executive Officer of Ackerman McQueen, Inc., a communications and advertising firm headquartered in Oklahoma City, Oklahoma. *See* McQueen Decl. at 1. Ackerman McQueen has provided communications advice and services to the NRA and NRA PVF for approximately 22 years. *See id.* at 2.



Although the program pictured Vice President Gore, it focused primarily on the history of gun confiscation in California. *See* LaPierre Decl. at 5-6 (only reference to federal candidate occurred when "a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore, then a presidential candidate, flashed on the screen for several seconds").

b. In 2000—on at least 438 occasions in the 60 days prior to the general election—the NRA aired a 30-minute news magazine entitled "It Can't Happen Here." *See* NRA App. at 1005-49. The program contained the same brief depiction of Vice President Gore as the "California" news magazine did. *See* LaPierre Decl. at 6.

c. In response to the media's coverage of the Million Mom March, the NRA aired a 30-minute news magazine that examined the forces and influences behind the March. *See id.* at 17. The news magazine aired dozens of times in the 60 days prior to the 2000 general election. *See* NRA App. at 245-48. The program made references to Senators Hatch and Feinstein and senatorial candidate Clinton and several of the references would have been covered by BCRA if the statute had then been in effect. *See id.* at 245-51; *id.* at 931 (Senator Hatch stating "[i]t's hypocritical" for Rosie O'Donnell's bodyguard to carry a gun); *id.* at 933 (woman stating candidate Clinton was at the March "for [her] own political gain").

d. The 60,623 airings of all issue ads (whether "genuine" or "sham") considered in *Buying Time 2000* ran for 31,069 minutes. *See* NRA App. at 1005-49. "California" and "It Can't Happen Here" aired in top television markets for 25,140 minutes in the 60 days prior to the 2000 general election. *See id.* at 216, 1005-49. The "Union/Gore" program featuring Charlton Heston, *see supra* Finding 42a at pages 83-84, ran for 17,220 minutes in top television markets in the 60 days

prior to the 2000 general election. *See* NRA App. at 108 (NRA infomercial data). If *Buying Time 2000* had considered these airings—and had coded them as "genuine" —at least 34 per cent (by duration) of the issue advertising that BCRA would have regulated in the 60 days prior to the 2000 general election would have been "genuine."

e. On March 2, 2000 President Clinton appeared for a 15-minute interview on NBC's "Today Show," during which he repeatedly criticized the NRA by name and stated that "most Americans have [no] idea what a stranglehold the NRA has had on [the] Congress." *Id.* at 907 (interview transcript). In order to respond to what it believed were unfair comments, the NRA developed a series of 30- and 60-second paid television ads in which NRA President Heston responded to President Clinton by name. *See id.* at 914 ("Mr. Clinton, you say . . . the NRA is 'against anything that requires anybody to do anything as a member of society that helps to make it safer.' Are you talking about the NRA whose gun accident prevention program has been distributed to 12 million school kids? Are you talking about the millions of NRA members who pay for it all?"). The NRA intended this series of ads to highlight the controversy with the President and to gain a forum in the national news media. The NRA's strategy succeeded in large measure because of the NRA's ability to purchase broadcast time and to respond to the President by name. *See* LaPierre Decl. at 11-12; McQueen Decl. at 9-14.

f. The NRA's financial strength is derived from pooling the resources of millions of Americans who seek to preserve what they believe is their constitutional right to keep and bear arms. *See* LaPierre Decl. at 23. Almost all of the NRA's net revenues are derived from individual contributions, which averaged $30 per person in 2000.



*See id.* at 23-24. Corporate contributions account for less than one per cent of the NRA's funds. *See id.* at 24.

g. The NRA's political action committee, NRA PVF, is unable to raise funds that fairly reflect individuals' support for the NRA's political mission and message.

1) While NRA PVF raised $17.5 million during the 2000 election cycle, the NRA received over $300 million in contributions from individuals during the same period. *See* NRA App. at 198; Cross Exam. of Pl. Witness Adkins[88] at 41. The disparity stems from the inability of NRA members—most of whom are individuals of modest means—to pay the NRA's membership fees and then contribute beyond that amount to NRA PVF. *See* LaPierre Decl. at 15.

2) Political action committees cannot finance more than a small fraction of the electioneering communications that corporations and unions have been able to fund from their treasury funds. *See id.* at 14-15; Boos[89] Decl. at 4-13; Keating Decl. at 11; Pratt[90] Decl. at 13-20.

3) Because many NRA members believe they face a risk of retaliation and harassment as a result of their views, they would not donate to NRA causes if doing so required them to disclose their identities. *See* LaPierre Decl. at 24-25; Adkins Decl. at 2; NRA

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[88] Mary Rose Adkins is the Treasurer of the NRA PVF and is responsible for maintaining records and accounting information on contributions thereto. *See* Adkins Decl. at 1.

[89] Michael Boos is Vice President and General Counsel of Citizens United, a non-profit tax-exempt interest group organized under the laws of Virginia. *See* Boos Decl. at 1.

[90] Lawrence Pratt is the Executive Director of Gun Owners of America, a non-profit tax-exempt interest group organized under the laws of Virginia. *See* Pratt Decl. at 1.

App. at 884 (letter from member to NRA PVF Treasurer upon being informed that FEC requires information about all persons who contribute $200 and over: "I am 73 years old and retired [but] I do not want to expose my current part-time employer to retaliation, so could you please send me a penny so that my contribution will be $199.99?").

52. Business associations need to be able to communicate their views to the public. Accordingly, many businesses regularly sponsor television, radio, cable and other public communications about matters of public interest. *See* Josten Direct Test. at 1; Monroe Direct Test. at 7.

a. Sometimes business associations sponsor broadcast communications directly and in their own names. In 1999, for example, Chamber of Commerce President Tom Donohue delivered a series of radio talks entitled "Speaking of Business." *See* Josten Direct Test. at 1. On two occasions in the late 1990s NAM sponsored in its own name issue ads supporting the President's tax proposals. *See* Huard Direct Test. at 1.

b. On other occasions business associations contribute to coalitions of like-minded organizations that prepare and air the communications. *See* Josten Direct Test. at 1-2; Huard Direct Test. at 1-2.

1) In March 2000 the Chamber of Commerce supported issue ads run by American Business for Legal Immigration. *See* Josten Direct Test. at 2.

2) "The Coalition: Americans Working for Real Change" is one example of a coalition joined by many businesses. In early 1996 the AFL-CIO announced that it would spend a large sum—allegedly $35 million—on issue advertisements attacking the Republican legislative agenda. The business community immediately decided that a response was necessary. In



April 1996 five leading business associations—including the Chamber of Commerce and NAM—formed the Coalition. *See* Huard Direct Test. at 1-2. The Coalition recruited about 30 organizations as public members, in addition to many contributors who asked not to be identified publicly. The Coalition ultimately raised and spent about $5 million on broadcast issue ads during 1996. *See* Josten Dep. at 29; Huard Dep. at 66.

c. The Chamber of Commerce, NAM and ABCI find that their ability to assure contributors that contemplated advertisements will not be "express advocacy"—and that the contributors, therefore, will not be required to be disclosed—is vital to obtaining contributions. Contributors seek anonymity with respect to particular issue ads for a wide range of reasons. Some fear that the ads may provoke or exacerbate difficulties with opposing groups such as labor organizations. Others fear that state or federal officials may retaliate. *See* Huard Direct Test. at 4; Josten Direct Test. at 4; Monroe Direct Test. at 5.

1) The Chamber of Commerce's Bruce Josten testified that members who support ads do "not want to be identified out of concerns that they may become targets or recipients of corporate campaigns or other types of what some would call union harassment activities." Josten Dep. at 28.

2) Stephen Sandherr, Chief Executive Officer of the Associated General Contractors of America, said his members "were concerned that if their contributions were publicly disclosed . . . their local building trades would take offense and would threaten actions on the job site or would threaten to make life miserable for them." Sandherr Dep. at 45.

3) ABCI's Edward Monroe testified that ABCI lost members who suffered acts of vandalism after their contributions were publicly disclosed. *See* Monroe Direct Test. at 5. Monroe also testified that potential members sometimes decline to join ABCI because they "do not trust our ability to keep [their] information confidential." Cross Exam. of Pl. Witness Monroe at 88-89.

d. In a rapidly moving communications environment, BCRA's requirement that a public report be filed within 24 hours each time a business association or its agent executes a contract to disburse a certain amount of funds for an electioneering communication imposes a severe burden on businesses' political advertising efforts, as does BCRA's requirement that all contributors of more than $1,000 be publicly identified. *See* Josten Direct Test. at 4; Monroe Direct Test. at 6.

1) Because expenditure amounts often become clear only as an advertising project progresses, it can be difficult to determine whether a particular contract (or subcontract or addendum) requires disbursements of more than $10,000. It can also be difficult to deter mine which of an ad's revisions is a new contract requiring disbursements of more than $10,000. *See* Huard Direct Test. at 4; Josten Direct Test. at 4; Monroe Direct Test. at 6.

2) BCRA's requirement of public notice when a contract to disburse is executed informs other associations and individuals what is being planned. Ideological opponents may take preemptive measures to render the planned communication impossible or ineffective. *See* Josten Direct Test. at 5.



e. Business associations' issue ads often, and of necessity, refer to federal candidates.

1) Federal officeholders and candidates are prominent individuals whose support of or opposition to a particular policy or bill may have important persuasive and informational effects. Calling proposed legislation a "Gingrich tax proposal" or a "Kennedy labor bill" often reveals more to the electorate than does a complex description of the policy or bill. *See* Huard Direct Test. at 2-3 ("[M]any people understand the general political inclinations of prominent officials or candidates better than they understand the intricacies of legislative policy.").

2) A flurry of legislative action often occurs near the end of a congressional session, *see* Cross Exam. of Def. Expert Mann at 176, and often, therefore, within 60 days of a general election. If business associations and coalitions cannot air near-election ads mentioning federal candidates or officeholders, they will have greater difficulty educating the public about, and motivating it to take action on, legislative proposals of interest to the business community. *See* Monroe Direct Test. at 3; Monroe Dep. at 60.

f. Some business associations have chosen to establish political action committees. For example, the Chamber of Commerce and ABCI have established, respectively, U.S. Chamber PAC and ABC PAC. *See* Josten Direct Test. at 5; Monroe Direct Test. at 9. Other business associations, including NAM, have considered sponsoring a political action committee but have concluded that the regulatory and financial burdens of doing so outweigh the political utility. *See* Huard Direct Test. at 3.

53. Two of the AFL-CIO's primary missions are to provide an effective political voice to workers on public issues that affect their lives and to fight for an agenda at all levels of government for working families. *See* G. Shea Decl. at 3. BCRA's ban on corporate and labor disbursements for electioneering communications and the statute's disclosure and reporting requirements significantly interfere with the AFL-CIO's missions.

a. The AFL-CIO maintains an active lobbying program aimed at influencing federal and state legislation and executive branch decisions affecting workers and their families. *See id.* at 5-23, Exhs. 2-18. The AFL-CIO's lobbying activities focus on a broad range of domestic and foreign policy matters of importance to union members, non-union workers, retirees and their families. *See id.*

b. The AFL-CIO relies on an extensive, year-round broadcast advertising program to gain public support for its legislative and policy agendas.

1) Between 1995 and 2001 the AFL-CIO sponsored in its own name over 70 "flights"[91] of television or radio advertisements, including seven flights in 1995, 25 in 1996, 10 in 1997, 12 in 1998, six in 1999, 13 in 2000 and four in 2001. *See* D. Mitchell [92] Decl. Exh. 1. During the same period the AFL-CIO co-sponsored seven flights of radio ads with other organizations under the name of a coalition or a coalition partner. *See id.*

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[91] A "flight" is a series of virtually identical ads broadcast during the same period of time in multiple media markets.

[92] Denise Mitchell is Special Assistant for Public Affairs to the President of the AFL-CIO and oversees all public relations activities of the AFL-CIO, including use of broadcast and print media. *See* D. Mitchell Decl. at 1-2.



2) The primary focus of the AFL-CIO's broadcast advertising in 1999 and 2000 was the "Patient's Bill of Rights," which had failed to gain approval in the previous Congress. *See id.* at 28, 30, Exhs. 117-123, 137-138; G. Shea Decl. at 21-22. The AFL-CIO also aired several flights of ads from February 2000 through June 2000 in opposition to President Clinton's proposal for permanent, normalized trade relations with China.[93] *See* D. Mitchell Decl. at 29-30, Exhs. 127-136; Cross Exam. of Pl. Witness D. Mitchell at 98; G. Shea Decl. at 20-21.

3) The timing of the AFL-CIO's broadcast advertisements is often dictated by upcoming votes in the Congress or by other events relatedto the legislative process. *See* D. Mitchell Decl. at 16-35 (providing specific examples); G. Shea Decl. at 9-23 (providing specific examples); *see also* D. Mitchell Dep. at 27-29, 31-32. During the weeks and months following an election or when the Congress adjourns its annual session, the AFL-CIO does not generally air ads because the public's attention usually turns to the upcoming holidays. *See* G. Shea Dep. at 55-57. When the Congress was in session in December 1995 during the federal budget crisis, however, the AFL-CIO broadcast a series of ads to influence its resolution. *See* D. Mitchell Decl. at 16-17.

4) While the AFL-CIO often broadcasts advertisements to influence short-term legislative action, it also broadcasts them to create long-term support for its positions. *See* D. Mitchell Dep. at 30-32; G. Shea Dep. at 52-53.

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[93] When President Bush reintroduced similar legislation in 2001 the AFL-CIO again ran broadcast advertisements opposing the proposal. *See* D. Mitchell Decl. at 35, Exhs. 154-58; G. Shea Decl. at 21.

5) The "targets" of the AFL-CIO's broadcast advertisements are selected on the basis of substantive and tactical factors, including the legislative issue involved; a legislator's committee assignments, prior voting record on similar legislation or leadership role with respect to particular legislation; the extent to which the target might help generate "free media" for the AFL-CIO's political message; and the concentration of union members in the jurisdiction targeted. *See* D. Mitchell Decl. at 7-8; D. Mitchell Dep. at 20-21, 205-06, 209- 12; Cross Exam. of Pl. Witness D. Mitchell at 198-200.

(A) The AFL-CIO's ads have targeted both Democratic and Republican officeholders and candidates. *See* D. Mitchell Decl. at 7-8, Exhs. 1-22; Cross Exam. of Pl. Witness D. Mitchell at 100, 179-80; Cross Exam. of Pl. Witness G. Shea at 31-32.

(B) The AFL-CIO's ads have targeted more Republicans than Democrats because Republicans generally favor legislation opposed by organized labor. *See* D. Mitchell Decl. at 7-8; Cross Exam. of Pl. Witness D. Mitchell at 100, 127-28; G. Shea Decl. at 13.

(C) The AFL-CIO's ads have targeted Democrats when Democrats have taken positions opposed by organized labor or when Democrats have been undecided on issues such as trade policy. *See* G. Shea Decl. at 12; Cross Exam. of Pl. Witness G. Shea at 31-32; D. Mitchell Dep. at 26-28, Exh. 2; Cross Exam. of Pl. Witness D. Mitchell at 100-01, 180-81.

6) With respect to advertisements run in the weeks and months immediately preceding a general election, the AFL-CIO sometimes selects jurisdictions in which



the candidates named in the advertisements are expected to be involved in close races. Based on experience and on advice it receives, the AFL-CIO believes that policymakers and the public are far more likely to pay attention to the organization's political message when an election is competitive than when an officeholder has no significant opposition. *See* D. Mitchell Decl. at 8; D. Mitchell Dep. at 17-20, 74, 205-06; Cross Exam. of Pl. Witness D. Mitchell at 128, 199; *see also* Rosenthal[94] Dep. at 95-97 (asserting that "if you are trying to help shape public debate, if you are helping to move elected officials to support a certain issue agenda, [issue] ads work best if they are run in a place where there is a competitive political environment").

7) The AFL-CIO's broadcast advertisements identify the AFL-CIO as their sponsor by using phrases like "paid for by the working men and women of the AFL-CIO." D. Mitchell Decl. Exhs. 2-22; *see* D. Mitchell Dep. at 103-04; G. Shea Dep. at 58-59; Rosenthal Dep. at 18. There have been only a few exceptions to this practice, all of which involved the AFL-CIO's sponsorship of advertisements under the name of coalitions created with other organizations. In those circumstances, it was not appropriate to list only the AFL-CIO as the sponsor. *See* D. Mitchell Dep. at 101-06; G. Shea Dep. at 59-60.

8) For cost reasons, the AFL-CIO runs virtually identical broadcast advertisements in several jurisdictions, often changing only the name of the targeted officeholder or candidate. *See* D. Mitchell Decl. at 5-6, Exh. 1.

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[94] Steven Rosenthal serves as Political Director of the AFL-CIO, oversees the organization's Political Department and is responsible for its day-to-day operations. *See* Rosenthal Decl. at 1.

c. Pre-BCRA, eighteen flights of AFL-CIO issue ads were broadcast within 60 days of a general federal election in which the officeholders named in the ads were candidates. If BCRA had been in effect at the time the ads aired, the AFL- CIO would be subject to civil and criminal penalties for spending any funds on any of the ads in the eighteen flights, including the following ads.

1) "No Two Way"—a television and radio advertisement focusing on an incipient fight in the Congress over the education budget—ran between September 5 and September 17, 1996 in media markets serving approximately 35 congressional districts. *See id.* at 21-22, Exh. 1; Cross Exam of Pl. Witness D. Mitchell at 27. The ad informed viewers and listeners that the named congressman in their area had voted with House Speaker Newt Gingrich to cut the college loan program in October 1995 and that the "Congress will vote again on the budget." D. Mitchell Decl. at 22. It ended by urging viewers and listeners to "Tell [the named congressman] 'don't write off our children's future.' . . . Tell him his priorities are all wrong." *Id.* The ad included a toll-free number to be used in contacting the named congressman.

2) "Deny," another flight of television and radio ads, ran between September 10 and September 23, 1998, shortly before the Senate was scheduled to vote on an HMO reform bill the AFL-CIO considered "extremely inadequate." *Id.* at 27, Exh. 1. "Deny" referred to approximately 17 Senators the AFL-CIO and its allies believed could be persuaded to vote for a stronger version of the bill. Thirteen of the Senators were not candidates in the 1998 election but four were. *See id.* at 27.



3) "Barker," an AFL-CIO radio advertisement, ran in eight congressional districts beginning on September 21, 1998 after a vote on "Fast Track" trade legislation was hastily scheduled for September 25. The ad urged listeners to call their congressman to "tell him to vote no on Fast Track. Tell him we're still paying attention. And Fast Track is still a bad idea." *Id.* at 28.

d. The AFL-CIO's broadcast advertisements would be significantly less effective if they did not mention legislative events. *See id.* at 16-35; G. Shea Decl. at 9-23; *see also* D. Mitchell Dep. at 27-29, 31-32. Furthermore, many of the AFL-CIO's broadcast advertisements would be significantly less effective if they had to be aired outside of the weeks immediately preceding primary and general federal elections—during which period a substantial amount of legislative business occurs and citizens, officeholders and candidates are more likely to pay attention to the AFL-CIO's political message. *See* D. Mitchell Decl. at 8; Mitchell Dep. at 17-20, 74, 205-06; Cross Exam. of Pl. Witness D. Mitchell at 128, 199; Rosenthal Dep. at 95-97; Gibson Rebuttal Report at 26-28 (refuting defense expert Goldstein's assertion that "a reasonable interest group would not air its issue ads during an electoral period").

e. The AFL-CIO's broadcast advertisements would be significantly less effective in influencing legislation and policy if they did not identify federal officeholders and candidates by name. Issue advertisements that identify policymakers by name and describe in detail their records can have greater impact on those policymakers than do issue ads that refer to issues more generically. Likewise, an ad that urges viewers or listeners to contact a specific policymaker regarding a political issue is more likely to engage them on the issue than is an ad that does

not ask them to take any action. *See* D. Mitchell Decl. at 8; D. Mitchell Dep. at 33-34; G. Shea Dep. at 33-34; *see also* Feingold Dep. at 238-39 (acknowledging that constituents often call in response to television advertisements).

f. If the AFL-CIO is prohibited from using its general treasury funds to sponsor broadcast issue advertisements of the kind it has run in the past, it will be unable to finance such ads to the same degree using federal contributions to its federally-registered political action committee, the AFL-CIO Committee on Political Education Political Contributions Committee (COPE PCC). *See* Rosenthal Decl. at 7-9; Rosenthal Dep. at 57-65.

1) Contributions to COPE PCC may be made only by union members and their families—or by certain employees of the AFL-CIO itself—and the amount of money that can be raised from these sources is generally limited and unlikely to increase to the extent necessary to replace the treasury funds now spent on issue advocacy. *See* Rosenthal Decl. at 7-8.

2) During 1998 and 2000 the AFL-CIO *spent* $8.4 million and $17.9 million, respectively, on its broadcast advertising program, *see* D. Mitchell Decl. at 15, while COPE PCC *raised* only $1.4 million and $1.1 million during those years, *see* Rosenthal Decl. at 8.

3) Any amount of funds COPE PCC spends on issue advertising necessarily reduces the amount of funds available for cash and in-kind contributions made directly to candidates, as well as the money available to support independent expenditures on behalf of candidates. *See id.* at 7-9.

4) Union members and other workers are generally unable to make large contributions of federal funds to political action committees or similar entities to



support broadcast advertising. *See id.* at 9. Also, in contrast to many corporate officials and other wealthy individuals, union members and other workers are generally unable to afford the high cost of personally sponsoring broadcast issue advertisements.

g. Since 1996 the AFL-CIO's political adversaries have made numerous efforts to pressure broadcast stations into refusing to run the AFL-CIO's ads. Some of the stations have given in to the pressure. *See* D. Mitchell Decl. at 12-13, Exh. 24; D. Mitchell Dep. at 174-76. If the AFL-CIO is required to file reports with the FEC regarding its proposed broadcast advertisements—or if broadcast stations are required to obtain such information and make it available to the public in advance of actually running the ads—efforts to interfere with the AFL-CIO's advertising program will likely intensify. *See* D. Mitchell Decl. at 13-15.

h. Advance disclosure of the AFL-CIO's advertisements will interfere with and have a chilling effect on the organization's broadcasting program by forcing it to reveal its plans and strategies before they are finalized and by giving opponents the opportunity to prepare counter-messages. *See id.*

i. For similar reasons, BCRA's requirement that a committee like COPE PCC disclose to the FEC within 24 to 48 hours its contracts to make independent expenditures will deter COPE PCC from making such expenditures. *See* Rosenthal Decl. at 9-10.

54. The record reflects that BCRA's ban on corporate and labor disbursements for electioneering communications will not prevent actual or apparent corruption of federal candidates.

a. To the extent that corporate and labor disbursements for electioneering communications corrupt or

appear to corrupt federal candidates—and little or nothing in the record suggests that they do, *see infra* Finding 54b at pages 127-28—BCRA leaves unregulated many communications that pose as great a risk of actual or apparent corruption.

1) Newspaper ads often dwarf broadcast ads, especially radio ads, in terms of their expense. For instance, a full-page ad in the *New York Times* can cost $65,000 whereas a 60-second radio broadcast that recites precisely the same text in a small market such as Peoria would cost only $75. *See* McQueen Decl. at 8; NRA App. at 256-57.

2) Direct mail is a vital, expensive and effective component of mass advertising campaigns designed to influence federal elections. *See* Magleby Expert Report at 25, 53; LaRocco[95] Decl. at 2 (in 1994 election "the Christian Coalition circulated 370,000 'voter guides' in the 1st District of Idaho that were intended to create negative impressions among voters and influence the outcome of the election"); Pennington Decl. at 2-3.

3) Ads broadcast over the internet are comparable to those broadcast over television and radio in terms of their public reach and impact and will almost certainly grow in influence in the coming years. *See* McQueen Decl. at 6-7.

(A) More than 168 million Americans, or 60 per cent of the general public, use the internet. *See* NRA App. at 348-49. More Americans use the internet than read a daily newspaper, *see id.*, and

[95] From 1990 to 1995, Larry LaRocco served as a member of the House of Representatives from the 1st Congressional District of Idaho. *See* LaRocco Decl. at 1.



internet usage is growing rapidly, *see id.* at 352. This trend is likely to continue because internet usage has grown at close to a rate of 100 per cent per year in recent years. *See id.*

(B) As a source of news and information, the internet rivals and is displacing the broadcast media. *See id.* at 443-99 (Pew Research Center study entitled "Internet Sapping Broadcast News Audience"). The rapid growth in internet usage is one of the reasons for the dramatic decline in broadcast news program viewing. *See id.* The internet has also become an increasingly popular source of political news during election periods. *See id.* at 408, 427.

(C) Numerous websites provide an alternative source of daily news that challenges the market dominance previously enjoyed by the traditional media. *See id.* at 500-01, 505-08. For example, the Drudge Report—an internet news service started by a single individual unaffiliated with any media company—receives up to five million visits per day. *See id.* at 507.

4) Issue ads broadcast outside the 30-day window preceding a primary election and the 60-day window preceding a general election can influence the election. *See* Milkis Rebuttal Report at 5.

5) The media industry is no longer "unique" in the way that it was 10 or 15 years ago.

(A) Over the past decade the role of the traditional media in informing and educating the public has been profoundly altered by the emergence of the internet. *See supra* Finding 54a.3 at pages 125-26.

(B) Since the mid-1980s many media entities have been subsumed within larger corporate conglomerates and have devoted their resources to bottom-line profits. *See* NRA App. at 620, 625-26, 631-39, 671-72. CBS has been acquired twice in the past decade, first by Westinghouse and then by Viacom; it is now a subsidiary of a conglomerate that runs oil companies, farms, theme parks and mining companies. *See id.* at 546-50, 554-56. Similarly, ABC is now part of the entertainment empire of Walt Disney Corporation, *see id.* at 522-26, NBC is owned by General Electric, *see id.* at 541-45, and Fox Television is part of Rupert Murdoch's global News Corporation, which owns transportation companies and sports teams, *see id.* at 532-38.

(C) Media subsidiaries in some circumstances have been pressured by their non- media parent corporations to advance the interests of the parent or of the affiliated non-media businesses. *See id.* at 600, 861-81. Some media companies have refused to cover stories that might compromise the interests of the parent or of the affiliated entities. *See id.* at 687-93.

6) The media industry is better able to influence elections than are corporations in any other industry because it can use its news reporting and editorial functions to influence public opinion about politicians and political candidates. *See id.* at 714-803.

b. None of the evidence the defendants have offered materially supports the proposition that corporate and labor disbursements for issue advocacy corrupt or appear to corrupt federal candidates. Nor does the evidence show that BCRA would alleviate actual or apparent corruption "in a direct and material way" to the extent that either exists. *Turner Broad. Sys., Inc. v. FCC*, 512



U.S. 622, 664 (1994). The defendants submit only unexamined anecdotal accounts of political consultants, legislators and former legislators for three propositions that, even if true, do not demonstrate that corporate and labor disbursements for issue advocacy corrupt or appear to corrupt federal candidates:

- "Unlike the general public, federal candidates and parties know who runs advertisements covered by the BCRA, sometimes because those running the ads make sure they know." FEC's Am. Proposed Findings of Fact at 214 (capitalization altered); *see id.* at 214-15.

- "Federal candidates who benefit from advertisements covered by the BCRA are grateful for the outside help." FEC's Am. Proposed Findings of Fact at 215 (capitalization altered); *see id.* at 215-18.[96]

- "Parties whose candidates benefit from advertisements covered by the BCRA are grateful for the outside help." FEC's Am. Proposed Findings of Fact at 218 (capitalization altered); *see id.* at 218-19 (citing Resp. of AFL-CIO and COPE PCC to FEC's First Reqs. for Admis. at 10 (acknowledging that "[a]t least one [p]olitical [p]arty has expressed appreciation or gratitude for [the AFL-CIO's] financing of at least one" electioneering communication)).

3. Limits on "Coordinated Expenditures"

As to BCRA's limits on "coordinated expenditures," *see generally supra* Part II.C, I would find that:

55. Since 1976 the Act has treated an expenditure that is "coordinated" with a candidate as a contribution. *See* 2 U.S.C. § 441a(a)(7)(B)(i).

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[96] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

56. In December 2000 the FEC promulgated new regulations that defined "coordination" narrowly in the context of "general public political communications." *See* General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76138 (Dec. 6, 2000). Under the FEC's December 2000 regulations, a disbursement for a communication was "coordinated" with a candidate if the communication was created, produced or distributed (1) "[a]t the request or suggestion of" the candidate or party committee; (2) after the candidate or party committee had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" resulting in a "collaboration or agreement" between the creator, producer, distributor or payer of the communication and the candidate or party committee about the content or distribution of the communication. 11 C.F.R. § 100.23(c)(2).

57. BCRA section 214 repealed the FEC's December 2000 coordination regulations because, according to one of BCRA's sponsors, they were "far too narrow to be effective in defining coordination in the real world of campaigns and elections and threaten[ed] to seriously undermine the soft money restrictions contained in [BCRA]." 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). The provision directed the FEC to promulgate new regulations that "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and an entity making a disbursement. BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note. In accordance with that mandate, the FEC on January 3, 2003 promulgated a final rule on "coordinated communications." *See supra* note 45. The rule provides as follows:

§ 109.21 What is a "coordinated communication"?



(a) *Definition.* A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

(1) Is paid for by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

. . .

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section. (1) A communication that is an electioneering communication . . . .

(2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). . . .

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A communication that is a public communication . . . about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. (d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) *Request or suggestion.*

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, political party committee, or agent of any of the foregoing; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion.

(2) *Material involvement.* A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:



(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion.* The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

. . .

(e) *Agreement or formal collaboration.* Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his

or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. *Formal collaboration* means planned, or systematically organized, work on the communication.

(f) Safe harbor for responses to inquiries about legislative or policy issues. A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

68 Fed. Reg. at 453-55.

58. The ACLU's legislative efforts include many activities directly associated with lobbying but do not involve contributions to candidates, political parties, political committees or participation at fundraising functions sponsored by candidates or political organizations. *See* Murphy[97] Decl. at 2.

a. The ACLU regularly meets, speaks or corresponds with Members of the Congress and executive branch officials regarding proposed or pending legislation or executive action that may affect civil liberties. *See id.*

b. The ACLU routinely testifies before the Congress, conducts staff briefings for the Congress and provides Members with ACLU position papers. *See id.*

[97] Laura Murphy is the Legislative Director of the ACLU. *See* Murphy Decl. at 1.



c. The ACLU holds press conferences, issues press releases, offers public commentary and makes regular media appearances and other public appearances asserting the organization's civil liberties positions on different legislative and executive initiatives. *See id.*

d. The ACLU works to build coalitions around common issues. It associates with at least 20 coalitions in a combined membership of over 250 organizations. The ACLU's legislative activities are frequently coordinated with other coalition partners. *See id.*

e. The ACLU maintains a congressional scorecard on important civil liberties issues and periodically publishes different guides on such issues. *See id.* at 3.

f. The ACLU and other organizations often work with Members of the Congress to ensure that proposed legislation is consistent with civil liberties principles. *See id.*

59. Under BCRA's definition of"coordination," as implemented by the FEC's regulations, many of the ACLU's legislative activities are subject to the prohibitions and limitations of FECA even though the ACLU does not engage in those activities for the purpose of influencing federal elections. *See id.* at 3-4.

60. The NRLC regularly lobbies federal legislators, consults with federal candidates about their positions on certain issues, disburses funds for electioneering communications and publishes printed communications, including what are known as "voter guides." Some of these activities are undertaken without communication with candidates and some are undertaken after communication with candidates. *See* O'Steen Decl. at 2.

61. A given business association's broadcast advertisments often address issues the association has discussed with Members of the Congress, representatives of political parties

and various cooperating organizations of all types. *See* Josten Direct Test. at 2. Business associations want to maintain contacts with Members of the Congress while participating in issue advocacy at the same time. *See* Huard Direct Test. at 3.

a. An association operating under a vague or overbroad definition of coordination faces serious risks each time it sponsors public communications either directly or through groups of like-minded organizations or individuals because any discussion with a legislator may later serve as the basis for an allegation that an association has coordinated a particular communication's content with the legislator. Likewise, a meeting with a legislator whose policy views are consistent with the association's views and with its advertisements may lead to a charge of coordination. *See* Josten Direct Test. at 3; Monroe Direct Test. at 3-4; DeFrancis[98] Dep. at 12, 21, 35, 43, 57.

b. The threat posed by a vague or overbroad definition of "coordination" is illustrated by the experience of the Chamber of Commerce, NAM and other business associations that were investigated in FEC Matter Under Review (MUR) 4624. The investigation in MUR 4624 pertained to the 1996 activities of an issue advocacy group called "The Coalition: Americans Working for Real Change." All of the Coalition's members were instructed to avoid any contact that could be perceived as coordination of the content, location or frequency of certain broadcast ads. Alleging that the Coalition's issue ads were coordinated with federal candidates, campaigns and political committees, however, the FEC pursued the

[98] Suzanne DeFrancis is a former Deputy Director of Communications at the RNC and currently serves as Senior Vice President, Director of Public Affairs at Porter Novelli, an advertising firm. *See* DeFrancis Dep. at 5-7.



investigation for years and, in the Chamber of Commerce's and NAM's judgment, it deterred the Coalition's members from supporting a similar advertising effort in 1998.[99] *See* Huard Direct Test. at 3-4; Josten Direct Test. at 2; Josten Dep. at 12-13.

1) On June 9, 1998—18 months after the Coalition's ads were broadcast—the FEC instituted MUR 4624 to investigate charges by the DNC that the Coalition, 28 of its members and R. Bruce Josten (Executive Vice President of the Chamber of Commerce) had coordinated their efforts with the National Republican Congressional Committee (NRCC), its treasurer and seven candidate committees. Parallel charges were leveled against candidates and committees with whom the Coalition had allegedly coordinated its advertising efforts.

2) The crux of the FEC's coordination charge was that Coalition members—who met regularly with Congressman John Boehner to discuss and promote pro-business legislative aspects of the "Contract With America"—had the opportunity to coordinate issue ads with Congressman Boehner, who was then the fourth-ranking Republican House member, the Republican Conference Chair and an *ex officio* board member of the NRCC. *See* Josten Direct Test. at 2.

3) After four years of extensive discovery, the FEC's General Counsel concluded there was "circumstantial evidence that the activities of the Coalition

[99] Although most records relating to MUR 4624 are confidential under 2 U.S.C. § 437g(a)(12), the FEC's public file contains a General Counsel's Report (Apr. 23, 2001) (General Counsel Report), a Statement for the Record by Commissioner Scott E. Thomas and Chairman Danny L. McDonald (Sept. 7, 2001), and a Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001) (Smith Statement).

were loosely coordinated with the Republican Party leaders, specifically Representative John Boehner and other candidates." General Counsel Report at 2. The General Counsel conceded, however, that "loosely coordinated" was not a viable standard in light of recently-enacted FEC regulations defining coordination, *see id.*, and therefore recommended that the case be dismissed. *See id.* at 3.

4) MUR 4624 was disruptive, burdensome and expensive. As a result of the investigation, Coalition members' willingness to participate in or support the Coalition evaporated. The Coalition financed only a few ads in 1998 and is now defunct. In his Statement for the Record, Commissioner Smith observed:

> Despite the fact that the Commission has found no violations in this case, I strongly suspect that the original complainant, the Democratic National Committee, considers its complaint to have been a success. The complaint undoubtedly forced [the DNC's] political opponents to spend hundreds of thousands, if not millions of dollars in legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the Act, I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.

Smith Statement at 2.

62. The AFL-CIO does not discuss its decisions regarding the content or placement of its broadcast advertising with any



candidate, candidate committee, party or party official. *See* D. Mitchell Decl. at 9; D. Mitchell Dep. at 229- 32, 235, 238; G. Shea Dep. at 71-72, 80-81.

a. The AFL-CIO's Political Department—and other persons who have regular contact with candidates and political party officials—played no role in broadcasting decisions during the period from 1995 to 1998 and virtually no role during the period from 1999 to 2000. *See* Rosenthal Decl. at 10-11; D. Mitchell Decl. at 9-10.

b. On the few occasions over the years that a candidate or a candidate's agent has approached the AFL-CIO and has encouraged it to run ads in a particular State or congressional district, the AFL-CIO has declined. *See* D. Mitchell Decl. at 9; D. Mitchell Dep. at 232-35, 243, Exh. 20; G. Shea Dep. at 91-92.

c. As a matter of policy, the AFL-CIO has likewise declined to honor requests from candidates *not* to air ads identifying them or their opponents because the AFL-CIO believes it has both the right and the ability to decide whether and what kind of broadcast advertising will advance its legislative and policy agenda. *See* D. Mitchell Decl. at 12, Exh. 23; D. Mitchell Dep. at 169.

63. Lobbyists from the AFL-CIO's Legislative Department regularly meet with Members of the Congress and employees of the executive branch on a host of issues. The AFL-CIO's executive officers and other staff also meet with Members on policy matters.

a. The AFL-CIO seeks through such contacts to influence the policy positions of legislators and officials.

b. The AFL-CIO also relies on such contacts to gather information about the status of particular legislation and the positions of other Members. Such information has often been a significant factor in deciding whether or not

to run broadcast issue advertisements on particular issues and in determining the timing, placement and content of the ads. *See* G. Shea Decl. at 23-24; G. Shea Dep. at 82-85, 89-90; D. Mitchell Dep. at 253-57.

64. If the AFL-CIO is prohibited from sponsoring broadcast ads because of its lobbying contacts with Members of the Congress, it will be forced either to curtail its lobbying activities or to refrain from airing public communications during elections.

a. The AFL-CIO is likely to refrain even from permissible lobbying contacts if it is unable to determine with utmost confidence that it can do so. *See* D. Mitchell Decl. at 9.

b. Even when the AFL-CIO *is* confident that a lobbying contact is permitted, it may nonetheless refrain therefrom if the contact can be construed by political opponents as improper or illegal. The AFL-CIO has been the target of complaints of improper coordination by its political adversaries in the past. Throughout 1996, for example, the AFL-CIO's political opponents filed a series of complaints with the FEC charging that the AFL-CIO had coordinated its broadcast advertisements and other activities with the Democratic Party and with certain Democratic candidates for federal office. *See* Rosenthal Decl. at 11; D. Mitchell Decl. at 8-9, 11. After a four-year investigation, the Commission concluded that no violation of FECA had occurred. *See* Rosenthal Decl. at 11; *see also AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 52-53 (D.D.C. 2001).

4. Restrictions on Non-Federal Funds

As to BCRA's restrictions on non-federal funds, *see generally supra* Part II.D, I would find that:

65. The FEC began tracking non-federal donations in the 1992 election cycle. During that cycle the Democratic and



Republican parties together raised $86.1 million in non-federal funds. During the 1994 election cycle the two major parties raised $101.6 million in non-federal funds; during the 1996 cycle they raised $263.5 million in non-federal funds; during the 1998 cycle they raised $222.5 million in non-federal funds; during the 2000 cycle they raised $487.5 million in non-federal funds; and during the 2002 cycle they raised $495.8 million in non-federal funds. *See* FED. ELECTION COMM'N, NEWS RELEASE: PARTY FUND-RAISING REACHES $1.1 BILLION IN 2002 ELECTION CYCLE (Dec. 18, 2002), *available at* http://www.fec.gov/press/20021218party/20021218party.html.

66. During the 1996 election cycle the 50 donors who gave the most in non-federal funds to the national political party committees each contributed between $530,000 and $3,287,175. During the 2000 election cycle the top 50 non-federal donors to the national committees each gave between $955,695 and $5,949,000. During the 2000 cycle 800 donors—435 corporations, unions and other organizations and 365 individuals—each gave a minimum of $120,000 to the national committees and accounted for almost $300 million, or 60 per cent, of all non-federal money raised by the committees. *See* Mann[100] Expert Report at 22-25, Tbls. 5, 6.

67. Senator McConnell routinely participates in political and fundraising events for state and local candidates and party committees.

a. For example, on July 5, 2002 Senator McConnell participated in an election strategy conference call with Kentucky state senator Robert Leeper; on August 15 he headlined a state party fundraiser to benefit state senate candidates; on August 20 he participated in a fundraiser

[100] Defense expert Thomas Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at the Brookings Institution. *See* Mann Expert Report at 1.

for a state senate candidate; and on September 28 he attended a rally for the Republican candidate for judge-executive in Butler County, Kentucky. *See* McConnell Aff. at 2.

b. Since his election to the Senate, Senator McConnell has been a member of the National Republican Senatorial Committee (NRSC), which advocates Republican principles and supports Republican candidates at the federal, state and local levels. Senator McConnell chaired the NRSC in the 1998 and 2000 election cycles and, as chairman, he raised non-federal funds. These funds were used for voter registration, identification and get-out-the-vote activities, issue advocacy, building projects and national support for state and local candidates. During his tenure as NRSC Chairman, Senator McConnell also directed non-federal NRSC donations to dozens of state and local candidates, including Virginia Republican gubernatorial candidate Jim Gilmore (in 1997); California Republican gubernatorial candidate Dan Lungren (in 1998); and the Republican candidate for mayor of Warwick, Rhode Island (in 2000). *See id.* at 3.

c. BCRA prohibits Senator McConnell from raising money for state or local parties or candidates from corporate or union donors, or in excess of $10,000 from individual donors. Absent BCRA, Senator McConnell would raise money for state and local parties in compliance with applicable state laws. *See id.* at 4-5.

d. During his 18 years in the United States Senate, Senator McConnell has met thousands of Americans with whom he has shaken hands, posed for photographs, answered questions and discussed legislative issues. The overwhelming majority of the meetings were with people who do not donate funds to the Republican Party



at the national, state or local level. Senator McConnell is usually unaware of the donation history of individuals with whom he meets. *See id.* at 8.

68. Plaintiff Thomas McInerney shares the Republican Party's general philosophy on policy issues. He has pursued his political and public policy goals by pooling his resources with like-minded Americans in Republican organizations at the national, state and local levels to promote Republican principles and candidates at the federal, state and local levels. *See* McInerney Aff. at 1-2.

a. Prior to BCRA's enactment McInemey donated amounts in excess of $57,500 per cycle to the national political party committees of the Republican Party and in excess of $10,000 per year to state and local Republican Party organizations. His donations were intended to support state and local candidates; voter registration activities for state and local parties; near-election voter identification activity; get-out-the-vote activity; generic campaign activity for state and local parties, including broadcast communications that promote the Republican Party when a federal candidate is on the ballot; slate cards, palm cards and sample ballots for state and local parties; absentee ballot programs for state and local parties; phone bank programs for state and local parties; public communications discussing policy issues, including communications that mention federal candidates in a manner that could be construed to "promote, support, attack or oppose" such candidates; and staff salaries of employees who spend 25 per cent of their paid time in any given month on any of these activities. *See id.* at 2-3.

1) In the 2002 election cycle McInerney donated more than $57,500 to Republican Party organizations

at the national, state and local levels—funds that were spent on many or all ofthe activities described above. *See id.* at 5.

2) In the 2000 election cycle McInerney donated more than $57,500 to Republican Party organizations at the national, state and local levels—funds that were spent on many or all of the activities described above. *See id.* at 6.

b. The laws of the State of New York permit McInerney to donate funds in excess of what BCRA permits him to donate.

1) New York law permits McInerney to donate $76,500 per year to state and local political party organizations—funds that may be spent on any of the activities listed *supra* in Finding 68a at page 142, including state and local candidate support, voter identification activity, slate cards, palm cards, sample ballots and phone bank programs for state and local parties. *See* McInerney Aff. at 3; *see also* N.Y. ELEC. LAW §§ 14-100 to 14-124 (West 2003).

2) New York law permits McInerney to make unlimited non-federal donations to the housekeeping accounts of state and local political party organizations—funds that may be spent on administrative expenses such as rent, utilities, printing costs, supplies and legal and accounting services; salaries and benefits, including the salaries of individuals who spend 25 per cent of their paid time in any given month on grassroots activities; activities that are not for the express purpose of promoting the candidacy of specific candidates, including issue advocacy referring to federal candidates and near-election voter registration activity. *See* McInerney Aff. at 4; *see also* N.Y. ELEC. LAW §§ 14-100 to 14-124 (West 2003).



3) New York law permits McInerney to make unlimited non-federal donations to the RNC, the NRSC, the Republican National State Elections Committee of the Republican National Committee (RNSEC), among others—funds that may be spent on any of the activities listed *supra* in Finding 68a at page 142. *See* McInerney Aff. at 4; *see also* N.Y. ELEC. LAW §§ 14-100 to 14-124 (West 2003).

4) BCRA prohibits McInerney from donating amounts in excess of $57,500 per cycle to Republican Party organizations at the national, state and local levels and in excess of $10,000 per year to state and local Republican party organizations—funds that McInerney would like to be used on the political activities listed *supra* in Finding 68a at page 142. *See* McInerney Aff. at 5.

c. McInerney's support for Republican Party organizations at the national, state and local levels reflects his shared philosophy and values with the Republican Party, not any corrupt motive.

1) Nothing in the record suggests that McInerney has ever attempted to make a non-federal donation to change the vote or official action of any federal official; has ever been solicited by any federal officeholder or agent of a national political party based on a promise or offer of any official action; or has ever donated funds that, to his knowledge, affected the vote or official action of any public official, including a federal official. *See id.* at 7.

2) Nothing in the record suggests that McInerney's support for the Republican Party at the national, state and local levels is dependent upon gaining access to federal officeholders. *See id.* at 8.

d. BCRA permits McInerney to make unlimited non-federal donations to interest groups that engage in many

or all of the activities listed *supra* in Finding 68a at page 142, while prohibiting him from making similar donations to Republican Party organizations at the national, state and local levels. Absent BCRA, McInerney would continue to make such donations to Republican Party organizations in compliance with the laws of the relevant States. *See* McInerney Aff. at 8.

e. Under BCRA, McInerney would be subject to criminal fines and imprisonment of up to five years for funding—at the same level and using non-federal funds—the same political activities he has funded in the past. *See id.* at 10.

69. Attorney General Pryor has sponsored public communications that refer to federal candidates and promote, support, attack or oppose such candidates, including communications that do not expressly advocate a vote for or against any such candidate. *See* Pryor Decl. at 1-3, Exhs. A-F. Pryor has received and hopes in the future to receive contributions from the RNSEC. *See id.* at 4. As a candidate for state office, Pryor has raised and spent funds for voter registration activities conducted within 120 days of a federal election and for voter identification, get-out-the-vote and generic campaign activities conducted in connection with elections in which a federal candidate has also appeared on the ballot. He intends to continue raising and spending funds for such activities, on his own and in association with other candidates for state and local office. *See id.* at 4-6.

70. Political parties have played and continue to play at least four critical roles in our country's political process.

a. First, the parties have coordinated the political activities and messages of various national, state and



local entities within the federal system. *See* Milkis[101] Expert Report at 13-14; Keller[102] Expert Report at 6-7.

b. Second, the parties encourage "democratic nationalism" by nominating and electing candidates and by engaging in discussions about public policy issues of national importance. Milkis Expert Report at 14-19. For example, the RNC has recently participated in public policy debates regarding a balanced budget amendment, welfare reform and education policy. *See* Josefiak Decl. at 27-29; RNC Exhs. 1711, 2428, 2440.

1) The parties recruit and nominate candidates, aggregate public preferences and provide a means of democratic accountability. *See* Green[103] Expert Report at 7; Magleby Expert Report at 33; Mann Expert Report at 28. Political scientists also credit parties with increasing voter turnout, encouraging volunteer grassroots political participation, fostering broader electoral competition by supporting challengers against incumbents and diluting the influence of organized interests. *See* Cross Exam. of Def. Expert Green at 83-84; Cross Exam. of Defense Expert Mann at 53; Keller Expert Report at 5-6; Milkis Expert

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[101] Plaintiffs' expert Sidney Milkis is the James Hart Professor of Politics at the University of Virginia; he is also a Senior Scholar and Co-Director of the American Political Development Program at the Miller Center of Public Affairs. *See* Milkis Expert Report at 1.

[102] Plaintiffs' expert Morton Keller was a Professor of American History from 1956 until 2001; he taught at the University of North Carolina at Chapel Hill, the University of Pennsylvania and Brandeis University. *See* Keller Expert Report at 1.

[103] Defense expert Donald Green is a Professor of Political Science at Yale University, where he also serves as Director of the Institution for Social and Policy Studies. *See* Green Expert Report at 1.

Report at 12-13; La Raja[104] Expert Report at 5, 7-8.

2) Party competition in general is healthy for democracy; it was a major force behind the expansion of the electorate through the enfranchisement of blacks in the South, reduction of the voting age to eighteen and the elimination of poll taxes and other constraints on voting registration. *See* Keller Expert Report at 15.

c. Third, the parties act as critical agents in developing consensus in the United States. *See* Milkis Expert Report at 19. In the words of one defense expert, parties are "the main coalition building institution[s] . . . by a good measure." Cross Exam. of Def. Expert Green at 84; *see* Cross Exam. of Def. Expert Mann at 53, 56 ("[n]o other group could come close to political parties" in moderating extreme views); Krasno & Sorauf Expert Report at 24 ("Parties with their necessary 'big tent' compete for the allegiances of multiple groups . . . .").

d. Fourth, the parties cultivate a sense of community and collective responsibility in American political culture. *See* Milkis Expert Report at 19-21; La Raja Expert Report at 3-4. Parties have been integral in forming a consensus on such divisive issues as social welfare policy. *See* Milkis Expert Report at 4.

71. As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the federal state and local levels. *See* Josefiak Decl. at 5, 11-17; *see also* Milkis Expert Report at 28-29. The RNC seeks to advance its core principles by

[104] Plaintiffs' expert Raymond La Raja is an Assistant Professor of Political Science at the University of Massachusetts, Amherst. *See* La Raja Expert Report at 1.



advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels. *See* Josefiak Decl. at 6; *see also* La Raja Expert Report at 20-22.

a. In pursuit of its objectives, the RNC engages in frequent communications with its members, officeholders, candidates, state and local party committees and the general public. These communications occur both during campaign seasons and at all other times. *See* Banning[105] Decl. at 11-13; Josefiak Decl. at 26, 32.

b. The RNC engages in activities intended to influence federal elections and supports those activities with federal funds. *See* Josefiak Decl. at 6, 26. The RNC spends federal funds on recruiting and training candidates; contributing to federal candidate campaign committees; coordinated expenditures on behalf of federal candidates; communications calling for the election or defeat of federal candidates; the federal share of research and issue development; and the federal share of voter registration, voter identification and get-out-the- vote campaigns. *See* Banning Decl. at 11; Josefiak Decl. at 7, 10, 26; La Raja Expert Report at 5-6; Magleby Expert Report at 48.

1) In 1996, following the Supreme Court's ruling in *Colorado Republican I* that political parties have a constitutionally protected right to make unlimited independent expenditures, the NRSC made independent expenditures on behalf of several candidates for

[105] Jay Banning is Director of Administration and Chief Financial Officer of the RNC and his responsibilities include managing the RNC's budget, overseeing its finance and accounting personnel, maintaining books and records, overseeing the RNC's annual audit, paying all bills and (before BCRA) serving as assistant treasurer for the RNC's various non- federal accounts. *See* Banning Decl. at 1-2.

the United States Senate while the RNC simultaneously made coordinated expenditures on behalf of the same candidates.

(A) The NRSC disbursed approximately $10.5 million in independent expenditures in 17 States where the RNC disbursed more than $4.3 million in coordinated expenditures: Alabama, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Maine, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Rhode Island, South Dakota and Wyoming. *See* Josefiak Rebuttal Decl. at 3.

(B) As part of its efforts, the NRSC took measures to assure no coordination with candidates, including the removal from the NRSC's office building of any staff working on the independent expenditures. *See id.*

2) Under BCRA, if the RNC decides to make a coordinated disbursement with respect to a candidate, it must first confirm that *no* other political committee—whether national, state or local—has made or is about to make an independent expenditure with respect to the same candidate. Likewise, if the RNC decides to make an independent expenditure with respect to a candidate, it must first confirm that no other political committee—national, state or local—has made or is about to make a coordinated disbursement with respect to the same candidate. The RNC's Chief Counsel, who is responsible for giving legal approval to all RNC coordinated disbursements, believes it will be difficult or even impossible under BCRA for a national party to police every party entity to make sure none has made or is about to make a coordinated or independent disbursement. *See id.* at 2.



c. The RNC also undertakes activities exclusively in connection with state and local elections. These activities are substantial both in their importance to the RNC's mission and in their resource commitment.

1) For elections in which there is a federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidates and candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities.

(A) In 2000 the RNC donated approximately $5.6 million in non-federal funds to state and local candidates for such activities. *See* Josefiak Decl. at 17.

(B) The RNC devotes substantial resources to state and local political activities during federal election years even when the federal races are not competitive in a particular State (as in California in 2002 and Indiana in 2000). *See id.* at 18; Peschong[106] Decl. at 4.

2) Even for elections in which there is *no* federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities. *See* Banning Decl. at 8-14; Josefiak Decl. at 5, 11-17.

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[106] John Peschong is currently the RNC's Regional Political Director for the Western Region and works in that capacity with Republican Party organizations in Alaska, American Samoa, California, Guam, Hawaii, Idaho, Nevada, Oregon, Puerto Rico, the Virgin Islands and Washington to assist them in their objective to elect federal, state and local Republican candidates. *See* Peschong Decl. at 1-2.

(A) Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia—hold elections for state and local office in odd-numbered years when there are normally no federal candidates on the ballot. *See* Josefiak Decl. at 11-12. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd-numbered years. *See id.* at 12.

(B) For the 2001 election, an "off-year" election with no federal candidates on the ballot, the RNC spent more than $15.6 million in non-federal funds on state and local election activity through donations to state and local candidates, transfers to state parties and direct spending. *See* Banning Decl. at 8-9. In the last two off-year elections combined, the RNC spent over $21 million in non-federal funds to support state and local election activity, not including substantial commitments of staff time and other resources. *See id.* at 7-15; Duncan Decl. at 9; Josefiak Decl. at 5, 11-17; Cross Exam. of Defense Expert Mann at 71; *see also* La Raja Expert Report at 15.

3) The RNC supports its non-federal activities with funds raised pursuant to the laws of the pertinent States and localities.

(A) Until BCRA's effective date the RNC maintained twelve non-federal accounts, known as RNSEC accounts. *See* Banning Decl. at 5.

(B) Because of the variations among state campaign finance laws, the RNC set up different rules to govern each RNSEC account according to the type and amount of donations that could be deposited therein and the type of disbursements that could be made therefrom. *See id.* at 3.



(C) Some RNSEC accounts were reserved for corporate funds, which were used to make donations or expenditures in States permitting the use of such funds in connection with state and local elections. *See id.*

(D) Other RNSEC accounts were reserved for individual funds, which were used to make donations or expenditures in States not permitting the use of corporate funds in connection with state and local elections. *See id.* at 4.

(E) Still other RNSEC accounts held funds raised and spent pursuant to the unique legal requirements of particular States; the RNC set up state-specific RNSEC accounts for California, Massachusetts, Michigan, Missouri, New York, North Carolina and Rhode Island. *See id.* at 4-5.

d. Prior to BCRA's effective date the RNC also engaged in "mixed" activities—that is, activities undertaken in connection with both federal and state or local elections.

1) The RNC supported voter registration, get-out-the-vote, generic party-building and grassroots activities that benefited all Republican candidates—federal, state and local—on the ballot in any given election. *See* Benson[107] Decl. at 4; Duncan Decl. at 7-8.

2) Pursuant to the Act and FEC regulations in force prior to BCRA's effective date, the RNC and other political parties paid for mixed activities using an "allocation" of federal and non-federal funds. Josefiak Decl. at 6.

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[107] Bruce Benson is the Chairman of the Colorado Republican Party and oversees the organization's party building programs and candidate support efforts. *See* Benson Decl. at 1.

(A) During presidential election years the RNC was required to pay and did pay for its mixed activities with at least 65 per cent in federal funds. *See* 11 C.F.R. § 106.5 (2001).

(B) During non-presidential election years the RNC was required to pay and did pay for its mixed activities with at least 60 per cent in federal funds. *See id.*

3) Recognizing that the RNC, like other national political party committees, is heavily involved in activities at both the federal and state levels, the FEC historically allowed the RNC to pay its administrative overhead—including salaries, employee benefits, equipment and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and non-federal funds. *See* Banning Decl. at 8; Josefiak Decl. at 6.

4) The RNC used a mix of federal and non-federal funds to pay for a wide range of activities not directly connected to the election of federal, state or local candidates. *See* Banning Decl. at 9-14; Josefiak Decl. at 27-29 (describing numerous "instances in which the RNC [paid] for broadcast issue advertising for the exclusive purpose of influencing the legislative and policy debate"). During the 2000 election cycle the RNC spent $43.6 million in non-federal funds and $27.6 million in federal funds—either directly or through state parties—on issue advertising. *See* Banning Decl. at 7. Thus, the RNC spent about one-third (approximately $43.6 million) of its total non-federal resources (approximately $130 million) on issue advocacy in that cycle. *See id.* at 8 (noting RNC spent almost as much non-federal money, $35.6 million, on administrative overhead costs in 2000 cycle); *see also* B. Shea Decl. at 3; RNC Exh. 2429.



5) The RNC used a mix of federal and non-federal funds to engage in significant non-broadcast communications with its supporters. For example, through the magazine "Rising Tide," the RNC provided a more in-depth explanation of the Republican issues agenda than is possible in a 30-second television advertisement. *See* Josefiak Decl. at 31; RNC Exh. 977. Also, the RNC uses the internet, e-mail and direct mail to spread its message. *See* La Raja Expert Report at 21; Magleby Expert Report at 42.

6) The RNC used a mix of federal and non-federal funds to support redistricting efforts, including redistricting litigation. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy per cent of the redistricting budget was to be funded with non-federal money. *See* Banning Decl. at 14; Josefiak Decl. at 21-22. The RNC spends more overall on state legislative redistricting than on congressional redistricting. *See* Josefiak Decl. at 22.

7) The RNC used a mix of federal and non-federal funds to conduct training seminars for Republican candidates, party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 "nuts-and-bolts" seminars on grassroots organizing and get-out-the-vote activities. During the same cycle the RNC spent $391,000 in non-federal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. at 10-11; *see also* La Raja Expert Report at 11 (parties "help candidates by training them and their campaign

staff," support which is particularly important "in an era of . . . campaigning that requires skillful application of advanced campaign technologies").

8) The RNC used a mix of federal and non-federal funds to promote grassroots initiatives and to support interstate cooperation on state issues among Republican state and local officials. For example, the RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. *See* Josefiak Decl. at 25; RNC Exh. 978. During the 2000 election cycle the RNC spent $199,000 in non-federal funds and $33,500 in federal funds on state and local governmental affairs. *See* Banning Decl. at 9-10.

9) The RNC used a mix of federal and non-federal funds to support efforts to increase minority involvment and membership in the Republican Party. During the 2000 election cycle the RNC spent $1,211,000 in non-federal funds and $2,163,000 in federal funds on minority outreach and support of allied groups. *See id.* at 12.

e. The RNC provides considerable direct and indirect financial assistance to state and local parties. The RNC assists state and local parties in and through fundraising training, candidate training, fund transfers, advertising, policy discussions, polling, forums, coalition building, research and consulting support, voter mobilization and list sharing. *See* B. Shea[108] Decl. at 14-16; Josefiak Decl. at 18-21; Banning Decl. at 8-14.

1) During the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in non-federal funds and $35.8 million in federal funds—to state and local parties. *See* FED. ELECTION COMM'N, NATIONAL PARTY TRANSFERS TO STATE/LOCAL COMMITTEES: JANUARY 1, 1999 TO DECEMBER 31, 2000, *available at* ttp://www.fec.gov/press/051501party fund/tables/nat2state.html.

[108] Beverly Ann Shea is the Finance Director for the RNC and oversees all of the RNC's fundraising activities. *See* B. Shea Decl. at 1-3.



2) Prior to BCRA's effective date the RNC also provided significant fundraising assistance to state and local candidates and parties through a variety of means.

(A) The RNC helped state and local parties through donor list exchanges; joint fundraising events; promotion of state party fundraising events; facilitating contributions from interested donors; providing matching incentives to encourage state parties to develop their in-house fundraising capabilities through the RNC's "Finance PLUS" program; and devoting personnel to state party fundraising needs. *See* Dendahl Decl. at 3; Duncan Decl. at 8-9; Josefiak Decl. at 12-13, 19-21; B. Shea Decl. at 14-17; *see also* La Raja Expert Report at 7, 11-12, 53.

(B) RNC officers sent fundraising letters on behalf of state and local candidates and parties, including during election off-years. *See, e.g.*, RNC Exh. 292; RNC Exh. 1762; RNC Exh. 1766; Feingold Dep. Exh. 12.

(C) RNC officers were substantially involved in helping state and local parties and candidates raise money in accordance with state and federal law.

(i) After becoming Chairman of the RNC in February 2002, Marc Racicot made 82 trips to 67 cities in 36 States in 2002. Virtually all of these

trips involved fundraising assistance to state and local parties and candidates. *See* Josefiak Decl. at 21.

(ii) RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver made 31 and 33 trips, respectively, the majority of which involved fundraising assistance to state and local parties and candidates. *See id.; see also, e.g.*, RNC Exh. 301.

(iii) Mike Duncan, current General Counsel and former Treasurer of the RNC, was actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. In the past few years Duncan sponsored a reception to support the reelection of a Kentucky state senator and he also hosted and attended numerous fundraising dinners in support of the Kentucky Republican Party. *See* Duncan Decl. at 3-5.

f. The RNC cooperates and works closely with state and local political parties to support the entire Republican platform and ticket at the federal, state and local levels.

1) Political scientists agree that "relationships among local, state, and national organizations have strengthened in the past three decades" and they attribute the cohesion to "the role of the national parties in providing resources and expertise to lower levels of the party." La Raja Expert Report at 7 (citations omitted); *see* Mann Expert Report at 30 ("The relationship between the national parties and their state parties has never been closer than it is today.").

2) Cooperation among national, state and local parties is generally healthy for American democracy:

> Cohesive parties enhance electoral accountability by linking the campaigns and platforms of federal, state and local candidates. In this way, they provide voters with clear signals about what the party stands for collectively. The joint campaigns of political parties across federal, state and local candidates also generate electoral economies of scale that mobilize greater numbers of voters. The national parties have been the catalysts for party integration because they possess the resources to coordinate such activity.



La Raja Rebuttal Report at 5.

3) Perhaps the best examples of national, state and local political party cohesion are the Republican Party "Victory Plans" and the Democratic Party "Coordinated Campaigns." All levels of the Republican Party structure actively participate in the design, funding, fundraising and implementation of Victory Plans, *see* Josefiak Decl. at 7-11, just as all levels of the Democratic Party participate in the design, funding, fundraising and implementation of Coordinated Campaigns, *see* Bowler Decl. at 23-24.

(A) The RNC's Victory Plans are voter contact programs designed to support the entire Republican ticket at the federal, state and local levels. The RNC works with every state party to design, fund and implement the Plans. *See* Benson Decl. at 3; Josefiak Decl. at 7; Peschong Decl. at 2-3.

(B) Victory Plans are formulated and implemented after collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of each State and designed to stimulate grassroots activism and to increase voter turnout with the goal of benefiting candidates at all levels of the ticket. *See* Josefiak Decl. at 7-11. The involvement of RNC national and regional field

personnel in developing, funding and implementing the plans is essential for their success. *See* Benson Decl. at 3; Peschong Decl. at 4.

(C) In 2000 the RNC transferred $42 million to state parties to use in Victory Plan programs, 60 per cent (about $25 million) of which was non-federal money and none of which was spent on broadcast issue advertising. *See* Josefiak Decl. at 9.

(D) Although Victory Plans are designed to bene-
fit Republican candidates at the federal, state and local levels, they often place the greatest emphasis on state and local races because in most instances there are far more state and local candidates than federal candidates on the ballot. *See* Bennett[109] Decl. at 15 (ratio of state and local candidates to federal candidates on ballot in Cuyahoga County, Ohio in 2002 was 18 to 1); Benson Decl. at 3.

(E) The Victory Plans are long-term programs spanning the entire election calendar year and are not limited to the 60 or 120 days prior to an election. *See* Peschong Decl. at 2-3.

(F) The Victory Plans generally include rallies, direct mail, telephone banks, brochures, slate cards, yard signs, bumper stickers, door hangers and door-to- door volunteer activities. *See id.*

[109] Robert Bennett is the Chair of the Republican State Central and Executive Committee of Ohio and oversees the organization's party building programs and candidate support efforts. *See* Bennett Decl. at 1.



g. With regard to the RNC's fundraising activities generally, I would find that:

1) In 2000 the RNC raised $99,178,295.61 in non-federal funds and $152,127,759.12 in federal funds. *See* RNC Exh. 2259.

2) The RNC engages in fundraising through direct marketing—i.e., direct mail, telemarketing and internet solicitations—and through "major donor" programs. In 2000 the RNC raised $105,860,700 through direct marketing and $146,929,900 through major donor programs. *See* B. Shea Decl. at 3. In 2001 the RNC raised $56,117,600 through direct marketing and $25,909,700 through major donor programs. *See id.*

(A) On average, 60 per cent of the total amount the RNC raises each year is obtained through direct marketing. *See id.;* Knopp[110] Decl. at 3. The direct marketing messages that "perform the best are those that emphasize the Republican Party's core political philosophy of lower taxes and less government and the RNC's important role in federal and state elections. In short, the RNC's fundraising success depends on its appeal to persons desiring to associate with its governing philosophy." Knopp Decl. at 19.

(B) "Major donors" are defined as individuals who give $1,000 or more per year. *See* B. Shea Decl. at 3. Like its smaller donors, the RNC's major donors are most responsive to appeals based on the RNC's ideology. *See id.* at 10-11. The RNC has six major donor programs: the President's Club is designed to raise federal contributions of $1,000 per person or

[110] Janice Knopp is the Deputy Director of Finance and Marketing Director for the RNC, in which capacities she oversees the RNC's direct marketing fundraising efforts. *See* Knopp Decl. at 1.

$2,000 per couple per year, *see id.* at 6; the Chairman's Advisory Board is designed to raise federal contributions of $5,000 per year, *see id.;* the Eagles program, the RNC's oldest major donor program, is designed for donors who either contribute $15,000 in federal funds or donate $20,000 in non-federal funds per year, *see id.;* the Majority Fund is directed at PACs that donate $15,000 in either federal or non-federal funds per year, *see id.* at 6-7; Team 100 is designed for donors who donate $100,000 in non-federal funds upon joining and then donate $25,000 in each of the three subsequent years, *see id.* at 7; and the Regents program is designed for donors who give an aggregate amount of $250,000 in non-federal funds per two-year election cycle, *see id.* In addition, every four years the RNC establishes a special "Presidential Trust," designed for contributions of $20,000 in federal funds. *See id.*

3) The RNC raises the bulk of its non-federal money from individuals—not corporations—and the average corporate donation of non-federal funds is significantly lower than the average individual donation. In 2000, for example, the average corporate donation of non-federal funds was $2,226, while the average individual donation of non-federal funds was $10,410. *See id.* at 5.

4) It is "exceedingly rare" for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea Decl. at 8. By RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff and members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and non-federal funds. *See id.*

72. The CDP and the CRP are subject to extensive federal and state regulation with respect to their campaign activities.



a. The CDP and the CRP each maintain a federal committee registered with the FEC. The federal committee maintains a federal account, contributions to which comply with FECA's source-and-amount limitations and reporting requirements. *See* Bowler Decl. at 5-6; Morgan Decl. at 2.

b. The CDP and the CRP are registered as political party committees in accordance with California law. Each maintains a non-federal account into which donations permissible under California law are deposited. The parties' non- federal campaign activities are subject to regulation by the California Fair Political Practices Commission and each party regularly files disclosure reports of receipts and expenditures with the California Secretary of State. *See* Bowler Decl. at 6-7; Morgan Decl. at 2.

c. Prior to BCRA's effective date the costs of the CDP's and the CRP's "mixed" activities were "allocated" between each party's federal account and non-federal account.

1) The CDP and the CRP were required to allocate funds for administrative expenses such as rent or employee salaries; generic voter identification activities; voter registration activities; get-out-the-vote activities that were not candidate-specific; fundraising expenses; and communications on behalf of both federal and non-federal candidates. *See* Bowler Decl. at 8.

2) The CDP and the CRP allocated funds in accordance with the FEC's regulations. They allocated funds for administrative expenses, generic voter identification activities, voter registration activities and get-out-the-vote activities based on a "ballot composition" formula that calculated the ratio of federal

offices and non-federal offices expected to appear on the general election ballot in a given election cycle. They allocated funds for public communications supporting or opposing federal and non-federal candidates using a "time-and-space" formula. And they allocated funds for fundraising expenses on a "funds raised" basis. *See id.* at 8-9.

d. In November 2000 California voters adopted Proposition 34 to govern campaign donations in the State.

1) Under Proposition 34, expenditures by political party committees on behalf of state candidates are unlimited. Donations by political party committees to state candidates are likewise unlimited, although donations by other donors to state candidates are limited depending upon the elective office. Donations to state and local political parties for the purpose of making donations to state candidates are limited to $25,000 per donor per year. Donations to state and local political parties for other purposes—e.g., funding administrative and overhead costs, voter Registration or get-out-the-vote activities or supporting ballot measures or issue advocacy—are unlimited. Donations to state and local political parties are not source-limited; that is, corporations and labor unions may donate funds in accordance with generally applicable limits. *See id.* at 6-7; Erwin[111] Decl. at 7; *see also, e.g.*, CAL. GOV'T CODE §§ 85301, 85303 (West 2003).

2) In adopting Proposition 34, California voters made a specific policy choice to increase the role of political parties in California elections. The voters determined that "[p]olitical parties play an important

[111] Ryan Erwin is the Chief Operating Officer of the CRP and oversees its day-to-day operations. *See* Erwin Decl. at 1.



role in the American political process and help insulate candidates from the potential corrupting influence of large contributions."*See* CDP App. at 1193 ("Proposition 34: Text of Proposed Law").

73. State and local political party committees generally, and the CDP and the CRP specifically, focus the majority of their resources on supporting state and local candidates, participating in state and local elections and influencing state and local policies.

a. The CDP and the CRP are more actively involved in state and local races than in federal races.

1) In States simultaneously holding their elections with federal elections, including California, state and local races on any particular ballot substantially outnumber federal races, of which there will ordinarily be a maximum of three in any election cycle. *See* Bowler Decl. at 8.

2) California holds elections for 120 legislative officers, eight statewide-elected officers and four members of the state board of equalization. It holds still more elections for local offices and for judicial offices and ballot measures at both the state and local levels. *See id.* at 5; Erwin Decl. at 5.

3) During the 2002 election cycle—in which there was only one competitive congressional race in California—the CDP was actively involved in eight statewide non-federal races and one dozen state legislative races. *See* Bowler Decl. at 5.

4) The CDP actively participates in municipal elections. In recent years the CDP has spent several million dollars in non-federal funds supporting candidates in major cities such as Los Angeles and San Francisco. *See* CDP Pls.' Proposed Findings of Fact at 6.

5) The CDP actively supports and opposes state and local ballot measures. In the March 2002 primary, for example, the CDP contributed over $3 million to a 501(c)(4) statewide ballot measure committee in an effort to extend term limits for members of the state legislature. *See id.*

b. The CDP and the CRP register voters primarily to influence state and local races.

1) The CDP registered over 300,000 new Democratic voters throughout California during 2002 when there was only one competitive congressional race. *See* Bowler Decl. at 13.

2) The CDP's expenditures on voter registration—consisting of a mix of federal and non-federal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January 1, 2001 to June 30, 2002. *See id.*

3) The CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *See id.*

4) The CRP has paid for voter registration—with a mix of federal and non-federal funds—through its Operation Bounty program, in which Republican county central committees, Republican volunteer organizations and Republican candidates for federal and state office participate. Through Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 cycle. *See* Erwin Decl. at 13; *see also* CDP App. at 1185 (charting CRP's voter registration activity by election cycle since 1984 cycle).



c. The CDP and the CRP conduct direct mail campaigns primarily to influence state and local races.

1) The CDP typically spends approximately $7 million to $8 million in non- federal funds on its mail program in support of state and local candidates.[112] *See* Bowler Decl. at 14-15.

2) The CDP's mailing materials typically do not mention federal candidates; instead, they mention the date of a given election, the locations of polling places and the hours the polls are open.*See id.*

3) In 2000 the CDP produced and sent out over 350 different mail pieces in support of state and local candidates and ballot measures. *See id.* at 15.

4) In most election cycles the CRP mails an absentee ballot application to registered Republican voters. In the 1994, 1996 and 1998 cycles the CRP sent between 2.25 and 2.5 million absentee ballot mailers to Republican voters. In the 2000 cycle the CRP sent approximately 5.2 million absentee ballot mailers. *See* Erwin Decl. at 15.

d. The CDP conducts get-out-the-vote telephone banks primarily to influence state and local races.

1) Approximately 40 to 50 per cent of the CDP's paid phone banking is conducted in connection with a specific state or local race and does not make reference to any federal candidate. *See* Bowler Decl. at 15-16.

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[112] The cost of communicating with voters by mail in California is staggering. The average cost of a CDP mail piece is approximately $0.25 to $0.35. (Postage alone is at least $0.10 per piece.) The average number of mail pieces for a state senate district is 150,000; the average number for a state assembly district is 90,000. *One* statewide mail piece costs approximately $260,000. *See* Bowler Decl. at 19-20.

2) Prior to BCRA's effective date, to the extent the CDP's phone banking mentioned both federal and non-federal candidates, expenditures therefor consisted of a mix of federal and non-federal funds. *See id.* at 15.

3) Prior to BCRA's effective date, to the extent the CDP's phone banking did not endorse any federal candidate, expenditures therefor consisted entirely of non-federal funds. *See id.*

e. The CDP and the CRP conduct get-out-the-vote door-to-door canvassing campaigns primarily to influence state and local races.

1) The CDP and the CRP routinely mail slate cards and hand deliver door hangers listing endorsed candidates, urging voters to vote on election day and informing voters of the date of the election and the polling place. *See id.* at 16; Erwin Decl. at 15-16.

2) Slate cards and door hangers are usually tailored for a particular local area. State and local races dominate numerically over federal races and in some instances no federal candidate is listed at all. *See* Bowler Decl. at 16; Erwin Decl. at 15-16.

3) Prior to BCRA's effective date, to the extent slate cards or door hangers mentioned both federal and non-federal candidates, expenditures therefor consisted of a mix of federal and non-federal funds. *See id.* Bowler Decl. at 16.

74. The CDP and the CRP cooperate with their national counterparts to support their candidates and platforms at all levels of the ticket.

a. The CDP works with the DNC in planning and implementing a Coordinated Campaign, the purpose of which is to allocate resources and coordinate plans for



the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket and their agents participate in the Coordinated Campaign and collectively make decisions regarding the solicitation, receipt, directing and spending of the CDP's funds, both federal and non-federal. *See id.* at 4, 23-24.

b. The CRP works with the RNC in planning and implementing a Victory Plan, the purpose of which is to allocate resources and coordinate plans for the benefit of Republican candidates up and down the entire ticket. The Victory Plan is implemented in the general election cycle with the involvement of RNC staff, CRP staff and state legislative leadership. *See* Erwin Decl. at 3-4.

75. With regard to the CDP's and the CRP's fundraising activities generally, I would find that:

a. The CDP has always raised more non-federal money than federal money.

1) The CDP raises a relatively constant amount of federal money. It raised $4,316,528 in federal funds in the 1996 election cycle; $4,076,870 in federal money in the 1998 cycle; $4,837,967 in federal money in the 2000 cycle; and $3,455,887 in federal money during the period from January 1, 2001 to June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See* Bowler Decl. at 6, Exh. A.

2) Even with increased efforts, it will be difficult for the CDP to raise more federal money under BCRA than it has in the past. *See id.* at 6.

(A) Over the years the CDP has tried many methods of raising more federal money, with little success. Through its telemarketing program, which has been the most successful method of raising

federal funds, the CDP has raised between $800,000 and $2 million with an average contribution of $27. The telemarketing program is expensive to run; it costs approximately $0.40 to $0.50 for every dollar raised. *See id.* at 28.

(B) Since 1995 the number of contributions made to the CDP at the $5,000 level—the pre-BCRA federal maximum—was very small, usually accounting for less than five per cent of the CDP's total in federal contributions. The total amount the CDP has received from maximum federal contributions ranged from $170,000 (in the 2000 election cycle) to $355,000 (in the 1996 cycle). Because the number of contributions at the $5,000 level is insignificant, BCRA's doubling the limit from $5,000 to $10,000 will not likely cause a substantial increase in federal funds contributed to the CDP. *See id.* at 28-29.

3) Prior to BCRA's effective date the CDP raised a relatively constant amount of non-federal money. It raised $12,991,251 in non-federal funds in the 1996 election cycle; $15,957,831 in non-federal money in the 1998 cycle; $15,617,002 in non-federal money in the 2000 cycle; and $13,928,496 in non-federal money during the period from January 1, 2001 to June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See id.* at 7, Exh. A.

4) Approximately 76 per cent to 86 per cent of the total amount in non-federal funds the CDP has received has been from donations exceeding the $10,000 "Levin Amendment" limit. *See id.* at 11-12, Exh. A; Torres Decl. at 3.



b. The CRP has always raised more non-federal money than federal money and it has employed several fundraising techniques to raise more federal money, with little success. *See* Erwin Decl. at 17-18.

1) The CRP raises federal funds through direct mail. To maintain a current and effective direct mail fundraising donor list, the CRP must continually spend funds prospecting for new donors. Such prospecting is expensive and often loses money. *See id.* at 18. Federal returns on direct mailings range, on average, from $20 to $40 per contributor. CRP direct mail returns reached a high in 1986 of over $2 million and have declined to under $1 million since 1997. *See id.*; CDP App. at 1189 (charting CRP's major funding sources by year since 1985).

2) The CRP also uses telemarketing to raise federal funds. Federal returns on the CRP's telemarketing range, on average, from $20 to $40 per contributor. Like direct mail prospecting, telemarketing prospecting is expensive and often unproductive. *See* Erwin Decl. at 19; CDP App. at 1189.

c. BCRA's prohibition against national party transfers of non-federal funds will impair the CRP's ability to engage in grassroots, voter identification, voter registration and get-out-vote activities, as well as issue advocacy.

1) BCRA's ban on national party transfers will reduce the CRP's available budget by approximately 40 per cent in presidential election cycles and 20 per cent in non-presidential election cycles. *See* Erwin Decl. at 29.

2) Had BCRA been in effect in the 1994, 1996, 1998 and 2000 election cycles, its ban on national party transfers would have reduced the CRP's overall

spending from $30 million to $18 million during presidential electioncycles and from $17.5 million to $14 million during non-presidential election cycles. *See id.*

d. Under BCRA, Torres (who, as Chair of the CDP, serves on the DNC Executive Committee) and Morgan (who serves as the CRP's National Committeeman to the RNC) may solicit, receive or direct *federal* funds only. *See* Bowler Decl. at 21- 22; Torres Decl. at 5; Morgan Decl. at 7-8.

76. BCRA's definition of "Federal election activity" restricts a large amount of state and local party activity undertaken primarily—and in many instances, *solely*—in support of state and local candidates. *See* Bowler Decl. at 14.

a. The term "get-out-the-vote" is not defined in BCRA. As interpreted by new FEC regulations, the term includes a significant amount of state and local party activity that is directed at state and local candidates and ballot measures and has little effect on federal elections. *See* Erwin Decl. at 25-26.

1) The CDP, the CRP and local party committees regularly send mass mailings addressed to individual voters within 72 hours of an election to provide information about the date and location of the election and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the mailings will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 14-15; Erwin Decl. at 15.

2) The CDP, the CRP and local party committees regularly deliver door hangers to individual voters on election day to provide information about the location of the election and to endorse non-federal candidates or ballot measures without referring to any federal



candidate. Under BCRA, the door hangers will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 16; Erwin Decl. at 15-16.

3) The CDP, the CRP and local party committees regularly place phone calls to individual voters within 72 hours of an election to provide information about the date and location of the election and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the phone calls will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 15-16; Erwin Decl. at 14-15.

4) The CDP and the CRP regularly send mass mail addressed to individual voters to provide them with absentee ballot information and to endorse non-federal candidates or ballot measures without referring to any federal candidate. Under BCRA, the mailings will be considered get-out-the-vote activity—and, therefore, "Federal election activity"—if a federal candidate is listed on the ballot. *See* Bowler Decl. at 14-15; Erwin Decl. at 15.

b. The CDP, the CRP and local party committees conduct the vast majority of their voter registration activities within 120 days of elections in which a federal candidate is listed on the ballot. Under BCRA, the registration activities must be funded with 100 per cent federally-regulated money even if the activities do not expressly promote or oppose any federal (or non-federal) candidate. *See* Bowler Decl. at 12-14; Erwin Decl. at 13-14. Voter registration activities will have to compete with candidate-support activities for federally-limited contributions and it is likely that the CDP's registration

activities will be significantly reduced or eliminated as a result. *See* Bowler Decl. at 14.

c. The CDP and the CRP regularly send mass mailings that contrast one party's position on an issue with that of the other. Under BCRA, the mailings will most probably be considered generic party activity and will have to be funded with 100 per cent federally-regulated money. *See id.* at 14-17. The CDP routinely sends a postcard to newly-registered Democratic voters explaining the principles of the Democratic Party and urging them to support the Party. Under BCRA, although the postcard does not refer to a federal candidate, it will most probably be considered generic party activity and will have to be funded with 100 per cent federally-regulated money. *See id.* at 16-17.

d. The CDP and the CRP regularly broadcast public communications that promote or oppose a political party but do not refer to federal or non-federal candidates. Under BCRA, the communications will most probably have to be funded with 100 per cent federal funds. *See id.* at 17.

77. BCRA prohibits the CDP and the CRP from donating *any* funds (federal or non-federal) to (1) any organization that is described in section 501(c) of the Internal Revenue Code of 1986, is exempt from taxation and "makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (2) any organization (other than a political committee) that is described in section 527 of the Code. BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d).

a. Most committees that are organized to support or oppose ballot measures in California are tax-exempt entities organized under section 501(c) of the Code. Virtually all of the ballot measure committees in California engage in activity that can be characterized as



get-out-the-vote activity under BCRA. *See* Bowler Decl. at 24.

b. Section 527 organizations include political clubs. The CDP has contributed to Democratic political clubs engaged solely in state-focused grassroots, voter registration and get-out-the-vote activities. *See id.* at 24-25. Likewise, most of the organizations participating in the CRP's Operation Bounty program, *see supra* Finding 73b.4 at page 166, are section 527 organizations, *see* Erwin Decl. at 13.

78. Under BCRA, the CDP and the CRP will have to reduce their communications with voters. Not only will some administrative costs have to be reduced, accounting costs will increase because of BCRA's additional monthly reporting requirements. Moreover, fundraising costs will increase because only federal money can be used to raise federal or Levin funds. Thus, simply to maintain current fundraising efforts, the parties' program and candidate-support activities will most probably have to be reduced. Because candidate support and get-out-the-vote activities are likely to remain the parties' priorities, voter registration, generic party-building and grassroots activities will likely be reduced or perhaps even eliminated. *See* Bowler Decl. at 18-19; Torres Decl. at 4.

79. Interest groups include persons and entities—whether corporations, unions, trade associations, advocacy groups or the like (but not political parties)—that (1) are interested in a particular issue; (2) participate in the political process; and (3) associate with others of like mind.

a. Interest groups normally do not build broad-based political coalitions but instead use discrete and issue-specific alliances to address issues at hand. In contrast, political parties generally seek to construct the broad-based coalitions necessary to achieve electoral victories and stability over longer periods of time. *See* La Raja Expert Report at 12-13.

b. Interest groups are subject to less regulation than are political parties. For example, unlike political parties, interest groups are rarely required to make public disclosure of their receipts, donors, disbursements or activities. *See* Beinecke[113] Decl. at 2, 4 (National Resources Defense Council is not required to file disclosure forms with FEC or disclose to the public amounts donated by foundations or individuals); Callahan[114] Decl. at 2-3 (certain amounts donated to League of Conservation Voters do not have to be reported to FEC); Gallagher[115] Decl. at 5-6 (National Abortion and Reproductive Rights Action League (NARAL) is not required to track whether it receives donations from persons outside United States and it respects rights of donors to remain anonymous); Sease[116] Decl. at 4 (Sierra Club is generally not required to report identity of individual donors to any government entity); *see also* Keller Expert Report at 22 (political activities of interest groups "are far less transparent than those of parties").

c. Interest groups engage in a wide array of political activities paralleling the activities of political parties.

1) Interest groups engage in voter registration, voter identification, get- out-the-vote activities and lobbying of officeholders. *See* Bennett Decl. at 4; Benson Decl. at 4-5; Dendahl Decl. at 3-4; Cross Exam. of Def. Expert Green at 158-59.

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[113] Frances Beinecke is the Executive Director of the National Resources Defense Council. *See* Beinecke Decl. at 1.

[114] Debra Callahan is the President of the League of Conservation Voters. *See* Callahan Decl. at 1.

[115] Mary Jane Gallagher is the Executive Vice President of NARAL. *See* Gallagher Decl. at 1.

[116] Deborah Sease is the Legislative Director of the Sierra Club. *See* Sease Decl. at 1.



2) Interest groups have increased their grassroots, direct mail, telephone bank and door-to-door mobilization efforts and they increasingly distribute absentee ballots and provide supporters with transportation to the polls. *See* Peschong Decl. at 6-7; Cross Exam. of Def. Expert Green at 21-22.

3) During the closing weeks of the 2000 campaign the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made seven separate direct mailings, operated telephone banks and provided grants to affiliated organizations. *See* Cross Exam. of Def. Expert Green at 15-20, Exh. 3; Cross Exam. of Def. Witness McCain at 70-72. The NAACP reports that its efforts turned out one million additional voters and increased turnout (over 1996 numbers) among targeted groups by 22 per cent in New York, 50 per cent in Florida and 140 per cent in Missouri. *See* Cross Exam. of Def. Expert Green Exh. 3. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single $7 million donation by an anonymous individual. *See id.* at 20, Exh. 3; Cross Exam. of Def. Witness McCain at 73-74.

4) In 2000 NARAL spent $7.5 million to mobilize 2.1 million pro-choice voters by making 3.4 million phone calls and mailing 4.6 million pieces of election mail. *See* Gallagher Decl. at 8.

d. Because FECA and BCRA place few restrictions on the sources or amounts of money that interest groups

may receive,[117] numerous interest groups have announced their intention to solicit donations from donors who prior to BCRA's implementation made non-federal donations to political parties.

1) Kate Michelman, the President of NARAL, has stated that non-federal donors seeking to "elect people who embody their values will be looking to [donate to] groups like NARAL, which do serious political work and are seasoned operatives." Gallagher Decl. at 16 ("If [non-federal donors] can't give to the par ties . . . they are going to find other means." (quoting Michelman)); *see* Lux[118] Dep. at 50-52 ("There will be organizations who will be able to raise more money because folks who used to give to the party will now give to outside groups. And hopefully I will be involved in many of those projects.").

2) Several defense witnesses acknowledge that the non-federal donations previously made to political parties will now be made to interest groups. *See* Cross Exam. of Def. Expert Mann at 164-65; Cross Exam. of Def. Expert Green at 24; Cross Exam. of Def. Witness Bok[119] at 55 ("Congress . . . cannot keep powerful interests from wanting to have an influence

[117] The Act as amended by BCRA *does* restrict certain tax-exempt interest groups from receiving transfers from political party committees. *See* BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d); *see also supra* Finding 77 at page 175; *see generally infra* Part IV.D.3.

[118] Michael Scott Lux is the President and co-founder of Progressive Strategies, LLC, a consulting firm that assists for-profit and non-profit groups, individuals and labor unions to engage in issue advocacy. *See* Lux Dep. at 5, 16.

[119] Derek Bok is currently the University Professor at the Kennedy School of Government at Harvard University; he is a former Dean of the Harvard Law School and President of Harvard University. *See* Bok Decl. at 1.



on government [and] so long as that desire remains[,] added limits on political donations will simply cause interest groups to seek other ways of exerting leverage that are not prohibited and may even be immune from any restriction under the Constitution. It is always possible that the new ways will be even more danger-ous than the old.").

80. There is no record evidence that non-federal donations to political party committees result in actual *quid pro quo* corruption of federal candidates and officeholders.[120] *See generally* FEC's Am. Proposed Findings of Fact at 20-134;[121] *see also* Intervenors Proposed Findings of Fact at 6-7 (alleging "[t]he record reflects various specific instances that reflect actual corruption" but citing no instances of *quid pro quo*).

a. Nothing in the record suggests that any Member of the Congress has ever cast or changed his vote on any legislation in exchange for a donation of non- federal funds to his political party. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (conceding lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder engaged in *quid pro quo* corruption); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106-07 (same); Meehan Dep. at 181-83 (same);

[120] The government's theory of actual (as opposed to apparent) corruption rests on two different propositions: (1) "soft money is often given to build or maintain relationships with federal candidates and officeholders that become the basis for future influence," FEC's Am. Proposed Findings of Fact at 20 (capitalization altered); and (2) "political party committees use soft money to influence federal elections," *id.* at 61 (capitalization altered). Neither proposition, assuming its accuracy, establishes that non-federal donations to political party committees result in *quid pro quo* corruption of federal candidates and officeholders.

[121] Portions of this cited material remain sealed pursuant to a separate order by Judge Kollar-Kotelly.

Shays Dep. at 171 (same); *see also* 148 CONG. REC. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution."); 147 CONG. REC. S3048 (daily ed. Mar. 28, 2001) (statement of Sen. DeWine) (BCRA's proponents "have failed in their burden" of proving corruption); 147 CONG. REC. S2936 (daily ed. Mar. 27, 2001) (statement of Sen. Wellstone) ("I want to say again that I don't know of any individual wrongdoing by any Senator of either party.").

b. No valid statistical evidence suggests that non-federal donations corrupt federal candidates or officeholders.

1) No valid statistical evidence supports the conclusion that non-federal donations influence roll call votes.

(A) Defense expert Green testified that there are no statistically valid studies showing a correlation between political donations (federal or non- federal) and legislative voting behavior. *See* Cross Exam. of Def. Expert Green at 58-61. Indeed, Green acknowledged that "[s]ome studies have even found a negative correlation." *Id.* at 54-55; *see* Cross Exam. of Def. Expert Sorauf at 132 ("political scientists lack the means to observe . . . such things"); Cross Exam of Def. Witness Bok at 18-21, 35-36 (existing studies erroneously assume "that because money goes to people who vote a particular way, the money must have caused the vote").

(B) Defense expert Mann testified that "[t]here is little statistical evidence that campaign contributions to members of Congress directly affect their roll call decisions. Party, ideology, constituency,



mass public opinion and the president correlate much more with voting behavior in Congress than do . . . contributions." Mann Expert Report at 32; *see* Milkis Expert Report at 34-35 (political parties prevent *quid pro quo* corruption by providing a "protective layer of decision makers between candidates and donors").

2) Novalid statistical evidence supports the conclusion that non-federal donations influence other legislative actions such as committee voting, offering amendments or filibustering. *See* Cross Exam. of Def. Expert Green at 55, 68-72, 95 (noting the one study that attempts to marshal such evidence fails to take lobbying and other activities into account); Cross Exam. of Pl. Expert Primo[122] at 136-38, 142-43 (only study's findings are mathematically unsupported).

c. Federal candidates and officeholders are typically unaware of who donates money to their parties. *See, e.g.*, Feingold Dep. at 115-16 ("Q: How generally are . . . Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done."); Snowe Dep. at 223-24 (unaware of non-federal donors to RNC); Jeffords Dep. at 94-97 (generally unaware of non-federal donors to RNC and DNC); Meehan Dep. at 179 (aware of some non-federal donors to national party committees only because "from time to time I read who they are in the newspaper"); *see also, e.g.*, Rudman Dep. at 76 (unaware); Wirth Dep. at 66-67 (unaware); Hickmott Dep. at 66-68 (noting that as Deputy Chief of Staff to former Senator Wirth he was

[122] Plaintiffs' expert David Primo is an Assistant Professor of Political Science at the University of Rochester in Rochester, New York. *See* Primo Expert Report at 1.

unaware who donated non-federal funds to national party committees).

d. There is no record evidence that political parties lobby federal officeholders and nothing in the record suggests that the RNC or any other party committee has ever attempted through the use of non-federal funds to persuade a federal officeholder to formulate or change his position on legislation. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 6; Vosdingh[123] Dep. at 89 (FEC unaware of any national party committee using non-federal funds to induce federal officeholder to support or oppose specific legislation); *see also, e.g.*, Meehan Dep. at 171-72 ("I am not aware of any occasions on which the Democratic Party, at the federal or state level, has sought to lobby Members of Congress."); *compare* Shays Dep. at 172-84 (stating Republican Party never attempted to change his vote; asserting someone had threatened to withhold funding from Republican Congressmen who voted in favor of BCRA; acknowledging he did not know who made the threat; and refusing to provide names of threatened officeholders), *with* Cross Exam. of Def. Expert Mann at 113-15 ("I would be shocked if [the RNC] ever did such a thing . . . . [T] he point is to win the marginal seat, to control the majority for the party, not to weaken a potentially vulnerable candidate . . . . It would be self-defeating. That isn't how it works.").

81. The defendants' contention that "party committees provide soft money donors with special access to federal office holders," *e.g.*, FEC's Am. Proposed Findings of Fact at

[123] Rhonda Vosdingh is an employee of the FEC and was deposed pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. *See* Vosdingh Dep. at 6.



24 (capitalization altered); *see id.* at 24-37;[124] Intervenors Proposed Findings of Fact at 7-9,[125] is supported only by unconvincing anecdotal evidence. More importantly, there is no record evidence that "access" to federal candidates and officeholders itself corrupts.

a. The RNC does not offer non-federal donors unique access to federal candidates and officeholders.

1) The RNC does not arrange meetings with government officials for any of its donors—federal or non-federal—and whenever a donor attempts to condition a donation on securing such a meeting, the RNC rejects the donation. *See* B. Shea Decl. at 19-20.

2) Based upon a review of the RNC's donor files, the RNC's Finance Director testified that, during the typical two-year election cycle, the RNC receives no more than 15 requests—most of them from contributors of *federal* funds—for meetings with Members of the Congress. For its part, the RNC passes the request on to the Member's scheduling staff without further input or follow-up. *See id.* at 20.

3) Federal candidates and officeholders appear at RNC-sponsored events for donors of federal funds as well as for donors of non-federal funds. *See id.* at 22; *see also* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4-5 (both federal and non-federal donors attend political party fundraisers and all six major national political party committees' fundraisers are open to both types of donors).

[124] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

[125] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

b. No valid statistical evidence supports the conclusion that non-federal donations secure special access to federal candidates and officeholders. Experts for the plaintiffs and for the defense—and other experts who have not testified in this case—agree that there exists no valid study linking donations and "access" or "legislative effort." Cross Exam. of Def. Expert Green at 55, 69-72 (existing studies fail to control for effect of lobbying expenditures and are not "statistically sound"); *id.* at 95 (studies make no effort to "track access specifically"); Krasno & Sorauf Expert Report at 5 ("[T]he absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior."); Primo Expert Report at 8-9 (noting only "scant evidence in the political science literature that money secures access" and stating that existing literature is statistically flawed); *see also RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Hermson Dep. at 300 (testifying on behalf of FEC that existing studies on "access" are "kind of weak and wishy washy")).

c. There is no record evidence that federal officeholders are more likely to meet with non-federal donors than with federal contributors. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence); *see also* Feingold Dep. at 116 ("I cannot imagine a situation where . . . I would meet with somebody because they gave soft money."); Snowe Dep. at 210-11 (stating she has never given preferential access to any donor, federal or non- federal, and that "[e]verybody has access to my office to the extent that I have time available"); Jeffords Dep. at 96-97 (stating person's status as donor to national party committee does not "affect [his] decisions as to who [he] meet[s] with or give[s] access to"); Meehan Dep. at 180 (stating he provides no preferential access to non-federal donors); Cross Exam. of Def. Witness Shays at 20-21



(acknowledging that, like most congressmen, he "pretty much [has] an open door policy to meet with people who want to talk to [him] about important legislative issues"). The evidence the defendants have offered to support their contention that non-federal donations secure "access" is unconvincing and fails to establish corruption.

1) The defendants rely on the testimony of several lobbyists for the proposition that corporations donate non-federal funds to gain "access." *See, e.g.*, FEC's Am. Proposed Findings of Fact at 27, 124-25 (citing, *inter alia*, Andrews[126] Decl.; Hickmott[127] Decl.; Rozen[128] Decl.).

2) These witnesses testified in depositions and on cross-examination that their corporate clients hire them in large part because of their contacts on Capitol Hill and because they have access to federal officeholders whether or not their clients have donated money to candidates, officeholders or parties. *See* Hickmott Dep. at 46-47, 50-51; Cross Exam. of Def. Witness Andrews at 19-20; *compare* B. Shea Decl. at 20 ("It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain 'aecess.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists.").

3) Lobbying is far more effective in securing "access" to federal officeholders than is donating campaign funds.

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[126] Wright Andrews is a lobbyist with the firm Butera & Andrews.

[127] Robert Hickmott is Senior Vice President of the Smith-Free Group, a "governmental affairs" firm located in Washington, D.C. Hickmott Decl. at 1-2.

[128] Robert Rozen is a partner at Washington Council Ernst & Young, a lobbying firm. *See* Rozen Decl. at 1.

(A) As former Senator Bumpers, a defense witness, testified previously, lobbying expenditures are more likely to secure non-incidental contact with a federal officeholder than are campaign donations. *See RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Bumpers Dep. at 38-40).

(B) Many entities and individuals who donate non-federal funds to political parties also spend money lobbying federal officeholders. The amount of money spent by such organizations on lobbying is often larger than the amount they donate to political parties. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate donors of non-federal funds during 1995 and 1996 donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 alone); *see id.* at 24-25 (admitting that top five corporate donors of non- federal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during same period).

d. Even if the defendants could establish that the donation of non-federal funds secures access to federal candidates and officeholders, they have not established that such access corrupts.

1) Two of the intervenors testified that they could remember few, if any, of the attendees of major donor events they had attended.

(A) Senator McCain has attended and spoken at a number of Republican Party "Team 100" events but does not recall the individuals who were present at the events nor the questions they asked. *See* McCain Dep. at 236-38 (like many Members of the Congress, Senator McCain "give[s] 20 speeches a week" and "[o]f course" does not remember donors).



(B) Similarly, Congressman Shays has attended numerous events at which non- federal donors were present. When shown a list of names of persons with whom he sat at a then-recent event, however, he could not recall a single one. *See* Cross Exam. of Def. Witness Shays at 20.

2) Contact between federal candidates or office-holders and the electorate is inherent in the democratic process. *See RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Herrnson Dep. at 302 (acknowledging that "access by interest groups to a congressman is an important facet of democracy")); Cross Exam. of Pl. Expert Primo at 150 ("[I]f it were the case that money influenced who got seen by a legislator[,] . . . you can't make a claim that that is necessarily bad for democracy, precisely because it could be that the ones that give money are the ones most informed about the issues at hand."); *see generally* U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances.").

82. There is no credible record evidence that "solicitation and use of soft money by political parties . . . has created an appearance of corruption," *e.g.*, FEC's Am. Proposed Findings of Fact at 87 (capitalization altered); *see id.* at 87-134; Intervenors Proposed Findings of Fact at 9-12 (anecdotal evidence in support of assertion that non-federal donations "appear to shape and skew . . . governmental decision making"),[129] nor, more significantly, any evidence

[129] A portion of this cited material remains sealed pursuant to a separate order by Judge Kollar-Kotelly.

that BCRA will remedy whatever perception of corruption exists.

a. Public opinion surveys purporting to show an appearance of corruption of federal candidates and officeholders arising from non-federal donations in particular are equivocal at best. *See, e.g.*, Mellman[130] & Wirthlin[131] Expert Report at 6 ("Over three in four Americans (77%) believe that *big contributions* to political parties have a great deal of impact (55%) or some impact (23%) on decisions made by the federal government." (emphasis added)).[132]

1) The surveys are poorly worded. *See* Primo Expert Report at 18-23; Cross Exam. of Pl. Expert Primo 112-14 (stating "the claim made by defense and proponents of campaign finance reform that the American public views the [campaign finance] issue as . . . a high priority . . . is not supported by the public opinion evidence," which "does not force a comparison with other issues"); Cross Exam. of Def. Expert Mellman at 38 ("Q: What does 'big' mean?

[130] Defense expert Mark Mellman is the Chief Executive Officer of the Mellman Group, a polling and consulting firm. *See* Mellman & Wirthlin Expert Report at 2.

[131] Defense expert Richard Wirthlin is Chairman of the Board of Wirthlin Worldwide, a public opinion research firm. *See* Mellman & Wirthlin Expert Report at 2.

[132] According to Mellman and Wirthlin's expert report, 46 per cent of respondents agreed that "individuals and/or groups should be free to give as much money to political parties as they want" and 49 per cent agreed that "it is important for individuals, issue groups, corporations and labor unions to have the freedom to express their views by making large political contributions." Mellman & Wirthlin Expert Report at 13. The report's authors have largely dismissed these findings, however, because "Americans are more likely to agree with any statement that includes . . . the words 'free' or 'freedom'" than with a statement that does not use them. *Id.*



A: Larger than small. Even larger than medium. Q: Can you give me a more precise definition? A: No. Q: In connection with campaign contributions, what does 'big' mean? A: Larger than medium, larger than small. Q: Can you give me an amount? A: Well, it's sort of like what the Supreme Court says about pornography, people know [it] when they see it. Even if I can't actually give you a precise amount."); *id.* at 38-41, 60-62 (acknowledging imprecision of survey).

2) It appears that the public does not understand the distinction between federal and non-federal funds and is not aware of campaign finance regulations. *See* Ayres[133] Expert Report at 3-4 (citing evidence that "public opinion about campaign finance regulations is shallow and poorly informed").

3) The Mellman and Wirthlin study upon which the defendants rely did not measure the public's understanding of the campaign finance system, did not ask if the respondents understood the difference between federal and non-federal funds and did not ask if BCRA would change the respondents' view of the campaign finance system. *See* Cross Exam. of Def. Expert Mellman at 31-35.

b. There is no record evidence that BCRA will remedy whatever appearance of corruption exists.

1) To the extent that the defendants' evidence of an appearance of corruption is based on legislative access afforded non-federal donors, similar access is granted to and through interest groups and lobbyists.

(A) Representatives of EMILY's List, NARAL, the League of Conservation Voters, the New Demo-

[133] Plaintiffs' expert Q. Whitfield Ayres is the President of Ayres, McHenry & Associates, Inc., a public opinion research firm. *See* Ayres Decl. at 1.

cratic Network and the Sierra Club have all stated that federal officeholders appear at their group-sponsored events. *See* Callahan Decl. at 2; Gallagher Decl. at 6-7, Exh. D; Rosenberg[134] Aff. at 3, Tab B; Sease Decl. at 5; Solmonese[135] Aff. at 5, Tab F.

(B) BCRA does not prohibit interest groups from providing access to federal officeholders; indeed, it appears BCRA may result in an enhancement of such access.

(C) BCRA does not prohibit interest groups from lobbying federal officeholders.

2) To the extent the public believes that non-federal donations corrupt, federal contributions are subject to the same public cynicism. *See* Ayres Rebuttal Report at 1-5; Milkis Rebuttal Report at 10-11 (any cynicism that exists will continue under BCRA).

(A) Under BCRA, individual donors can contribute up to $57,500 in federal funds to the political party committees during each two-year election cycle. Defense expert Green testified that a typical American would believe $57,500 is an amount that (in the words of Mellman and Wirthlin) "ha[s] a great deal of impact . . . on decisions made by the federal government." *See* Cross Exam. of Def. Expert Green at 267.

(B) Plaintiffs' expert Ayres replicated the survey conducted by defense experts Mellman and Wirthlin but substituted BCRA limits for the word "big." He found that "every conclusion that the Wirthlin-

[134] Simon Rosenberg is the President of the New Democrat Network and is familiar with its day-to-day operations. *See* Rosenberg Aff. at 1.

[135] Joe Solmonese is the Chief of Staff of EMILY's List and is familiar with its day-to-day operations. *See* Solmonese Aff. at 1.



Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new . . . hard money limits in BCRA." Ayres Rebuttal Report at 4-5.

3) Among the "corruptions" the defendants' witnesses identify are negative campaign ads, *see, e.g.*, Williams[136] Decl. at 3; intense fundraising efforts, *see, e.g.*, Meehan Dep. at 128; high campaign costs generally, *see, e.g.*, Cross Exam. of Def. Witness Strother[137] at 38-39; and the FEC itself, *see, e.g.*, McCain Dep. at 15-16, 89.

4) Defense expert Shapiro[138] conceded that he knows of no public opinion evidence showing that BCRA will reduce the appearance of corruption, *see* Cross Exam. of Def. Expert Shapiro at 114-17, and that any public cynicism about the role of money in politics is longstanding, existed before the 1990s and has been stable over time, *see id.* at 39-41.

5) Defense expert Mann testified that "a major restructuring of campaign finance law"—which BCRA plainly is—"would not dramatically reduce corruption and purify politics and government." Cross Exam. of Def. Expert Mann at 31.

6) Defense expert Sorauf acknowledged that "it's speculative" whether BCRA will remedy whatever

[136] From 1979 to 1997, Pat Williams served as a member of the United States House of Representatives from the State of Montana. *See* Williams Decl. at 1.

[137] Raymond Strother is a professional media consultant at the firm Strother Duffy Strother. *See* Strother Dep. at 12-14.

[138] Defense Expert Robert Shapiro is a Professor in the Department of Political Science at Columbia University and currently serves as Chairman of the Department. *See* Shapiro Expert Report at 1.

perception of corruption exists. Cross Exam. of Def. Expert Sorauf at 191.

5. The Ban on Minors' Contributions and Donations

Finally, as to BCRA's ban on minors' contributions and donations, *see generally supra* Part II.E, I would find that:

83. Barret Austin O'Brock contributed his own money (not received from any other person for purposes of the contribution) to John Milkovich, who was his Sunday school teacher for two years and was a candidate for United States Representative for the 4th Congressional District of Louisiana. O'Brock intends to contribute to federal candidates in the future unless prohibited by BCRA. *See* O'Brock Decl. at 1.

84. None of the parents of the *Echols* plaintiffs has used his or her child's name—or any other person's name—to make a contribution that FECA would otherwise prohibit. *See* T. Echols Decl. at 6; B. Solid Decl. at 2; D. McDow Decl. at 2; P. Mitchell Decl. at 3; C. White Decl. at 2. All of the *Echols* plaintiffs plan to contribute funds within their own direction and control—earned from allowances and part-time jobs—to federal candidates who share their views on political issues like abortion, divorce and the size of government. *See* E. Echols Decl. at 4-6; D. Solid Decl. at 4-5; H. McDow Decl. at 4-5; I. McDow Decl. at 4-5; J. Mitchell Decl. at 5-6; Z. White Decl. at 4-5.

*C. Standards of Review*

In *Buckley*, the Supreme Court began its constitutional analysis of FECA by iterating some "General Principles," *Buckley*, 424 U.S. at 14-23, that necessarily serve as the starting point for the analyses set forth in Part IV of this opinion:

> [C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . [T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course



> includ[ing] discussions of candidates. . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . [I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.

*Buckley*, 424 U.S. at 14-15 (quoting, *inter alia*, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *New York Times Co.*, 376 U.S. at 270) (internal quotations omitted); *see Republican Party v. White*, 122 S. Ct. 2528, 2538 (2002) ("[T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." (quotation omitted) (emphasis in original)); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). In proceeding below to apply an "array of formulas, tests, prongs, and tiers, often phrased in highly abstract legal jargon—'overinclusiveness and underinclusiveness,' 'narrow tailoring,' 'intermediate scrutiny,' and so on," it will be important to bear these "first principles" in mind. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 46 (2000); *see United States v. Lopez*, 514 U.S. 549, 552 (1995) (in evaluating constitutionality of congressional enactment, "[w]e start with first principles"); L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*,

1982 SUP. CT. REV. 243, 258 ("let us not lose sight of the speech"); *see generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). With that said, I turn now to the standards of review that *Buckley* and its progeny have established—and which the panel must follow—in evaluating governmental restrictions on campaign financing.

Under the Supreme Court's jurisprudence, the rigor of our review of BCRA's provisions varies according to the type of campaign financing restricted. It has long been understood that, consistent with *Buckley*, courts are to apply a slightly lower level of scrutiny in evaluating a restriction on contributions to candidates than in analyzing a restriction on expenditures. *See, e.g., Colorado Republican II*, 533 U.S. at 440 ("ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions" to candidates); *but see Colorado Republican I*, 518 U.S. at 640 (Thomas, J., concurring in judgment and dissenting in part) (declaring that "there is no constitutionally significant difference between campaign contributions and expenditures," that "[b]oth forms of speech are central to the First Amendment" and that curbs on either "must be strictly scrutinized"). The Court held in *Buckley* that a ceiling on campaign expenditures "impose[s] direct and substantial restraints on the quantity of political speech," *Buckley*, 424 U.S. at 39, and that its constitutionality therefore "turns on whether the governmental interests advanced in its support satisfy the *exacting scrutiny* applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45 (emphasis added); *see NCPAC*, 470 U.S. at 496 (restriction on expenditures, which are "entitled to full First Amendment protection," must be "narrowly tailored" to serve a "strong governmental interest").



"[B]y contrast," the Court stated in *Buckley*, a limit on contributions to candidates and their campaign committees imposes only a modest restraint upon contributors' ability to engage in free speech because

> [a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

*Buckley*, 424 U.S. at 20-21; *see Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (*Cal-Med*) (plurality opinion) ("The 'speech by proxy' that [a contributor] seeks to achieve through its contributions . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."). Thus, the Court recognized in *Buckley* that "the primary First Amendment problem raised by . . . contribution limitations" is not their encroachment upon direct expression but "their restriction of one aspect of the contributor's freedom of political association." *Buckley*, 424 U.S. at 24-25. Pointing out that "[m]aking a contribution . . . serves to affiliate a person with a candidate" and his ideas, *id.* at 22, the Court held that a contribution-to-candidate limitation can be sustained only if the state affirmatively "demonstrates a sufficiently important interest" and "employs

means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see Shrink Missouri*, 528 U.S. at 387-88.

A court, therefore, is to apply "exacting scrutiny"[139] to an expenditure cap[140] and something just short of that in examining a contribution-to-candidate limit. Nonetheless, the boundary between expenditures and donations does not place the two types of funding into "watertight compartments." *Springer v. Philippine Islands*, 277 U.S. 189, 209, 211 (1928) (Holmes, J., dissenting) (declaring, in separation-of-powers context, that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white"). Not all expenditures are precisely alike, nor are all donations; accordingly, the distinction between the two is a fluid one. For example, in holding that the Congress may constitutionally limit a party expenditure that is coordinated[141] with

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[139] In the campaign finance context, the Court has placed "exacting scrutiny" on an even plane with the more familiar "strict scrutiny." *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (in determining constitutionality of restriction on independent expenditures, Court "must ascertain ... whether it is narrowly tailored to serve a compelling state interest"); *MCFL*, 479 U.S. at 251-52 (burdens on independent expenditures, which are reviewed with exacting scrutiny, must be "justified by a compelling state interest"). In no case of which I am aware does the Court hold that exacting scrutiny is any *less* rigorous than strict scrutiny.

[140] Courts are also to apply exacting (i.e., strict) scrutiny to disclosure and reporting requirements triggered by expenditures. *See Buckley*, 424 U.S. at 64; *see also infra* Part IV.B.

[141] Under the Act, as amended by BCRA, an expenditure is coordinated with a candidate or with a party committee—and is treated as a contribution thereto—if it is made "in cooperation, consultation, or concert, with, or at the request or suggestion of" the candidate or committee. BCRA § 214; FECA § 315(a)(7)(B)(i), (ii); 2 U.S.C. § 441a(a)(7)(B)(i), (ii).



a federal candidate by treating it as a contribution, *see Colorado Republican II*, 533 U.S. at 465, the Court observed:

> The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. . . . But facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify. . . . [We have] observed that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." . . . But [we have] also observed that "many [coordinated expenditures] are . . . virtually indistinguishable from simple contributions."

*Id.* at 442-45 (quoting *Colorado Republican I*, 518 U.S. at 616, 624 (plurality opinion)). Under *Colorado Republican II*, then, if a coordinated expenditure is "virtually indistinguishable from [a] simple contribution[ ]," we review any limit placed thereon by the same standard we use to review a contribution-to-candidate cap—both must be "'closely drawn' to match a 'sufficiently important interest.'" *Colorado Republican II*, 533 U.S. at 446 (quoting *Shrink Missouri*, 528 U.S. at 387-88).

By the same token, however, the Court has recognized that in some instances a contribution restriction will function, for all intents and purposes, as a limit on fully-protected independent expenditures. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), for example, the Court struck down a Berkeley, California ordinance that placed a $250 limit on contributions to *committees* making independent expenditures in support of, or in opposition to, ballot

measures submitted to popular vote. In doing so, the Court strongly reaffirmed its commitment to protecting the right of individuals and entities to associate in order to engage in political issue advocacy, a right that is undermined by limiting the amount of money that can be given to committees spending funds on such advocacy:

> *Buckley* identified a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*. . . . Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression. . . . [A]n individual may make expenditures without limit under [the ordinance] on a ballot measure but may not contribute beyond the $250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue . . . . A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.

*Id.* at 296-300 (emphasis in original). Subjecting the $250 contribution-to-committee limit to the same "exacting judicial scrutiny" that *Buckley* had applied to the *expenditure* limits, *Citizens Against Rent Control*, 454 U.S. at 294, 298, the Court struck it down, finding that it intolerably "hobble[d] the collective expressions of a group." *Id.* at 296. I can only conclude from the *Citizens Against Rent Control* decision—and the rest of the Court's free association jurisprudence—that the courts are to apply "exacting scrutiny" to laws



limiting donations to associations that make independent expenditures in order to engage in collective political issue advocacy. Because my analysis of BCRA's restrictions on party use of non-federal money is shaped in large measure by this particular conclusion—and because the decision about which standard of review to apply often proves outcome-determinative, *see Shrink Missouri*, 528 U.S. at 400 (Breyer, J., concurring) (observing that "a strong presumption against constitutionality [is] often thought to accompany the words 'strict scrutiny'")—I explain in greater detail in Part IV.D.1.a, *infra*, my view that the restrictions are subject to "exacting" (i.e., strict) review.

## IV. Constitutional Analyses

With the foregoing precepts in mind, I turn now to the plaintiffs' constitutional challenges.

### *A. The Ban on Corporate and Labor Disbursements for "Electioneering Communications"*

The First Amendment provides, in pertinent part, that the "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The text itself prompts a few observations that are particularly relevant to an analysis of BCRA's ban on corporate and labor disbursements for electioneering communications. First, the Amendment does not restrict its protection of political speech to natural persons only. As the Supreme Court recognized in *First National Bank v. Bellotti*, 435 U.S. 765 (1978), political speech

> is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity

> of its source, whether corporation, association, union, or individual. . . . The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [a law] abridges expression that the First Amendment was meant to protect.

*Id.* at 776-77; *see also Austin*, 494 U.S. at 657 ("mere fact" of being corporation "does not remove its speech from the am bit of the First Amendment").

Second, the Amendment's command that the "Congress shall make no law" means that, however benign its intentions, the Congress has no license to decide how best to ensure that the electorate's deliberation about candidates is rational or balanced. *See Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating . . . in the course of a political campaign." (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972))); *see also White*, 122 S. Ct. at 2538 (same, quoting *Brown*, 456 U.S. at 60); *Austin*, 494 U.S. at 679 (Scalia, J., dissenting) ("[G]overnment cannot be trusted to assure, through censorship, the 'fairness' of political debate."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 317 (1978) (hereinafter BeVier, *Political Speech*) ("[I]t is the *fact* of participation in the political process that the amendment protects, not its qualities of sanity and objectivity." (emphasis in original)). Instead, the First Amendment delegates to the populace at large the responsibility of conducting an "uninhibited, robust, and wide-open" debate about government affairs and political candidates. *See Buckley*, 424 U.S. at 14, 57 ("In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who



must retain control over the quantity and range of debate on public issues in a political campaign."); *see also Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment places "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry"); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."). This time-honored "marketplace" conception of the First Amendment, *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), "derives its instrumental justification in part from straightforward mistrust of the motives of elected officials (and the suspicion that they are relentlessly incumbent-protective) and in part from skepticism about the competence of even the best-motivated politicians to design and to craft legal rules" tailored so that they do not dampen the debate. Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1774 (1999) (hereinafter BeVier, *Issue Advocacy*).

Drawing support from these observations—and from the "express advocacy" test announced in *Buckley*—the plaintiffs contend, *inter alia*, that BCRA's ban[142] on corporate and

[142] The defendants emphasize throughout their briefs that section 203 "is not a ban on speech." *E.g.*, Gov't Br. at 129; *see also, e.g.*, Gov't Opp. Br. at 55; Intervenors Opp. Br. at 56 (provision "is not a ban—although it is an important restriction"); Gov't Reply Br. at 53-62; Intervenors Reply Br. at 63-70. Their contention is constitutionally irrelevant under the Supreme Court's decision in *MCFL*, as the Fourth Circuit recently

observed in striking down FECA's restriction on corporate expenditures and contributions as applied to a non-profit advocacy corporation:

> [The FEC] submits that the Act . . . allows all corporations to make campaign contributions through a separate segregated fund, and corporations that do not fall within 11 C.F.R. § 114.10's exception to make independent expenditures through such a fund. *See* [2 U.S.C.] §§ 441b(a) and (b)(2)(C). Given the availability of this alternative avenue through which to make contributions and expenditures, the FEC maintains that it is factually incorrect to contend that an absolute ban is at issue in this case.
>
> However, the FEC's view has already been rejected by the Supreme Court in *MCFL*. While restricting MCFL's campaign spending to use of a separate segregated fund "is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts." *MCFL*, 479 U.S. at 252. . . . A segregated fund is a "political committee" under the Act. 2 U.S.C. § 431(4)(B). As a consequence, organizations that use a segregated fund must adhere to significant reporting requirements, staffing obligations, and other administrative burdens. These burdens stretch far beyond the more straightforward disclosure requirements on unincorporated associations. *See MCFL*, 479 U.S. at 252-53. . . . [Thus,] "while [the statute] does not remove all opportunities for independent spending . . . , the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *MCFL*, 479 U.S. at 255 [.] . . . Accordingly, we have little difficulty concluding that the prohibitions of [2 U.S.C] § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 burden the exercise of political speech and association.

*Beaumont v. FEC*, 278 F.3d 261, 269, 271 (4th Cir.) (Wilkinson, C.J.), *cert. granted*, 123 S. Ct. 556 (2002); *see Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("That [speakers] remain free to employ other means to disseminate their ideas does not take their speech ... outside the bounds of First Amendment protection. . . . That [a restriction] leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." (citing *MCFL*, 479 U.S. 238)); *see also supra* Finding 44d at page 100 (explaining how ACLU's speech would be burdened if ACLU were forced to establish political action committee), 51g at pages 110-11 (stating NRA's political action committee is



labor disbursements for electioneering communications violates the First Amendment because it restricts, in both overbroad and underinclusive fashion, speech that does not expressly advocate the election or defeat of a clearly identified candidate. I agree.

* * *

As I have mentioned, *see supra* Part I, the Court in *Buckley* held that the government's interest in "limit[ing] the actuality and appearance of corruption" arising from large campaign donations to candidates was sufficiently compelling to justify the Act's limits on contributions. *Buckley*, 424 U.S. at 26. The Court has acknowledged several times since then that funds given (and, in certain narrow circumstances, spent) on expressly advocating the election or defeat of federal candidates can be restricted to prevent corruption of federal candidates and officeholders.[143] *See Shrink Missouri*, 528

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incapable of raising funds that fairly reflect NRA members' support for NRA's political message), 53f at pages 122-23 (same, with respect to AFL-CIO and its political contributions committee). I can put it no better than the Fourth Circuit, although I note that *MCFL* and *Beaumont* addressed "expenditures" and "contributions" made "for the purpose of influencing" federal elections, *not* disbursements for issue advocacy, which under *Buckley* and its progeny merit even greater First Amendment protection and make rejecting the defendants' argument even easier.

[143] It bears noting, however, that the Court has held preventing actual or apparent corruption of federal candidates and officeholders is the *only* possible justification for restricting campaign finances. *See NCPAC*, 470 U.S. at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests[.]"); *see also Colorado Republican I*, 518 U.S. at 623 (plurality opinion) ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions" (citing *Bellotti*, 435 U.S. at 790)); *cf. infra* note 148 and accompanying text (noting Court's definition of "corruption" is somewhat unclear).

U.S. at 389 (citing cases); *see also Austin*, 494 U.S. at 658-60. Nonetheless, in *Buckley* the Court rejected the government's contention that an interest in preventing corruption justified the Act's $1,000 limit on any person's "expenditures relative to a clearly identified candidate." *Buckley*, 424 U.S. at 39-51. Expressing concern that the expenditure cap imposed criminal penalties "in an area permeated by First Amendment interests," *id.* at 41, and emphasizing that "First Amendment freedoms need breathing space to survive," *d.* at 41 n.48 (quoting *NAACP v. Button*, 371 U.S. at 433), the Court found that the phrase "relative to" lacked sufficient specificity to be sustained. *Id.* at 41 ("The use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech . . . ."). Likewise, it found that the Court of Appeals' narrowing construction—under which the $1,000 limit applied to money spent on "advocating," expressly or otherwise, "the election or defeat of [a] candidate," *Buckley*, 519 F.2d at 853—was also too imprecise and sweeping to eliminate vagueness and overbreadth problems because it failed to account for the fact that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

*Buckley*, 424 U.S. at 42. Emphasizing the need for a bright line to ensure proper "breathing space" for political issue advocacy—the funding of which cannot be regulated even though it may affect the outcome of elections and, therefore, potentially could be used to



> obtain *quid pro quos* from candidates, *see id.* at 45-46—the Court formulated the "express advocacy" test: [I]n order to preserve the [$1,000 expenditure limit] against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office. . . . This construction would restrict the application of [the provision] to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

*Id.* at 44 & n.52 (emphasis added); *see id.* at 80 & n.108 (express advocacy construction of "expenditure" necessary "[t]o insure that the reach of [the statute] is not impermissibly broad").

In focusing on the precise *words* used in a political message, the Court declined to adopt a standard that would require discerning the intent of the speaker or the message's effect on a given listener because such a standard would not fully alleviate vagueness and overbreadth problems or their "chilling" effect on political speech:

> [W]hether words intended and designed to fall short of invitation [to vote for a candidate] would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject [of politics] would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. . . . [A] distinction [based on intent or effect]

> offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

*Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)); *see also id.* at 80.

The defendants contend that "*Buckley* does not prohibit Congress from enacting narrowly tailored anti-corruption measures simply because they are not limited to communications containing express advocacy." Gov't Br. at 148 (capitalization altered); *see id.* at 148-53; Intervenors Br. at 99-103. Several courts of appeals have held, however, that the express advocacy test is not simply the Supreme Court's interpretation of FECA but an irreducible constitutional minimum that no campaign finance restriction can diminish. *See, e.g., Moore*, 288 F.3d at 190 (holding Mississippi statute could constitutionally extend only to political advertisements "advocat[ing] *in express terms* the election or defeat of a candidate" (emphasis in original)); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187, 1193-95 (10th Cir. 2000) (stating "distinction between permissible restrictions on 'express advocacy' and impermissible restrictions on 'issue advocacy' remains viable" and holding Colorado statute regulating "political messages" unconstitutional because it extended to issue advocacy); *Perry v. Bartlett*, 231 F.3d 155, 162 (4th Cir. 2000) (per curiam) (North Carolina statute was unconstitutionally overbroad because it regulated "political expression . . . which on its face [was] issue advocacy"), *cert. denied*, 532 U.S. 905 (2001); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (provisions of Vermont statute "necessarily unconstitutional unless they apply only to advertising and mass media activities that expressly advocate the election or defeat of a clearly identified candidate" (quotation omitted)).



In the conspicuous absence of contrary precedent, I would be loath to hold that the Congress was free to reject the express advocacy test in enacting Title II, even if I agreed with the defendants—and I do not—that the test "ha [s] become all but meaningless." Intervenors Br. at 100 (citing Thompson Comm. Rep. at 4564 (ability of corporations and unions to influence federal elections with ads that do not use words of express advocacy is "biggest . . . loophole [ ]" in federal election law)). The defendants assert that, since *Buckley*, federal elections have seen "a full-fledged effort by outside groups to use 'issue advocacy' as a means of evading both FECA's limitations on corporate and union campaign spending as well as its disclosure requirements, beginning a trend that continued and accelerated through the 2000 election cycle." Gov't Br. at 37. Even if the defendants' assertion is accurate—and on this record I am not convinced that it is—it is beside the point. The Court in *Buckley* was well aware that the express advocacy test would permit loophole-seekers to influence elections: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45; *see* McConnell Br. at 48 ("[T]he *Buckley* Court recognized that this construction would not capture all electorally-motivated or related advocacy."). Nonetheless, the Court held that the express advocacy construction of FECA was constitutionally necessary to ensure that protected issue advocacy had the requisite "breathing space." *See* McConnell Br. at 49 ("*Buckley*'s message is clear: the government must err on the side—the First Amendment side—of leaving protected political speech unregulated."); *see also Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1404 (2002) ("The Government may not suppress lawful speech as the means to

suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."). I cannot agree with the defendants, *see, e.g.*, Intervenors Br. at 99-109, that the electoral experience since *Buckley* justifies abandoning the express advocacy test, especially when: (1) no court of which I am aware, from the Supreme Court to the state courts, has ever explicitly held that the test is a statutory one tied only to FECA;[144] (2) several courts of appeals have held to the contrary,[145] *see supra;* and (3) the Court, in adopting the test,

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[144] *But cf. Wis. Realtors Ass'n v. Ponto*, No. 02-C-424-C, 2002 WL 31758663, at *5-*8 (W.D. Wis. Dec. 11, 2002) (district court was "not convinced that *Buckley* . . . establish[ed] an unalterable principle of constitutional law" but observed nonetheless that "[e]ven if *Buckley* did not establish *the* definitive test for determining what types of political communications are subject to regulation, [it] recognized that 'groups engaged purely in issue discussion' were beyond the reach of regulators" (quoting *Buckley*, 424 U.S. at 79) (emphasis in original)); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F.Supp. 2d 1300, 1325 (S.D. Ala. 2002) ("*Buckley* articulated an express electoral advocacy benchmark in order to *avoid* deciding the permissible reach of disclosure requirements." (emphasis in original)).

[145] A number of district courts and state courts have followed the lead of the courts of appeals. *See, e.g., Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d 928, 936 (D. Kan. 1999) (holding Kansas statute unconstitutional because it attached disclosure requirements to ads that "discuss[] an issue while disparaging one candidate and commending his opponent . . . without expressly advocating the election or defeat of [either] candidate"); *Right to Life, Inc. v. Miller*, 23 F. Supp. 2d 766, 769 (W.D. Mich. 1998) (holding Michigan statute prohibiting use of candidate's name or likeness in corporate communications within 45 days of election facially overbroad because it did "not merely prohibit communications that expressly advocate[d] the election or defeat of a clearly identified candidate" but "prohibit[ed] *any* mention of the name of a candidate . . . *regardless* of the context in which that name [was] mentioned" (emphasis in original)); *Planned Parenthood Affiliates, Inc. v. Miller*, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (same); *W. Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D. W. Va. 1996) ("By creating a presumption [of] express advocacy, the West Virginia



foresaw its costs and dismissed them as insufficient to justify overbroad restrictions on issue-driven speech at the core of the First Amendment.

I point out as well that express advocacy is itself entitled to full constitutional protection in the absence of a sufficiently compelling governmental interest in limiting it. *See Buckley*, 424 U.S. at 48 ("Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."). After narrowing the $1,000 expenditure limit's applicability to express advocacy only, the Court in *Buckley* nonetheless found that the provision failed the "exacting scrutiny" applicable to expenditure restrictions because

> the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expen-

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Legislature attempts to change the definition of express advocacy laid down by the United States Supreme Court. . . . Obviously, a state legislature cannot alter the Supreme Court's interpretation of the Constitution."); *see also, e.g., Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 824 (Wash. 2000) ("[U]nder *Buckley* issue advocacy is not subject to regulation, and our conclusion that the advertisement in question is issue advocacy necessarily means that [the statute in question] is unconstitutional insofar as it restricts [an] expenditure for the ad."); *Osterberg v. Peca*, 12 S.W.3d 31, 50-54 (Tex.), *cert. denied*, 530 U.S. 1244 (2000).

> diture to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

*Id.* at 46-47. Not all restrictions on independent expenditures for express advocacy have failed the Court's exacting scrutiny, however; in *Austin* the Court upheld a Michigan statute that prohibited any corporation from spending its treasury funds in support of or in opposition to any state candidate because the State had articulated a compelling interest to support the ban:

> Regardless of whether [the] danger of "financial *quid pro quo*" corruption . . . may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

*Austin*, 494 U.S. at 659-60. Nonetheless, it bears emphasizing that the Court's holding in *Austin* was limited to corporate expenditures on *express* advocacy.

*Buckley* and its progeny have thus established a rough framework for measuring a campaign finance restriction's constitutionality. If by its vagueness the restriction appears to limit both express advocacy and issue advocacy, the reviewing court must (if possible) construe the provision narrowly to restrict only the former and not the latter. *See Buckley*, 424 U.S. at 40-44; *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (federal court will uphold statute if it is "readily susceptible [of] a narrowing construction that would make it constitutional" (internal quotations omitted)). Of course, not every speech restriction can be refashioned to prevent its invalidation; as



the Court admonished in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), it must be remembered that

> although [the courts] will often strain to construe legislation so as to save it against constitutional attack, [they] must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it. . . . To put the matter another way, [the courts] will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutionaldefects.

*Id.* at 515 (quotation omitted); *see Erznoznik*, 422 U.S. at 216 (statute must be "easily susceptible" of narrowing construction); *see also* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute."). Accordingly, if a restriction plainly limits issue advocacy, the reviewing court will strike down the provision as unconstitutionally overbroad because "the statute's very existence may cause others not before the court to refrain from [that form of] constitutionally protected speech." *Broadrick*, 413 U.S. at 612 (discussing reach of overbreadth doctrine); *see Perry*, 231 F.3d at 160-62. If the provision—either by its text or by fair construction—relates only to express advocacy, the court must then ask what sort of campaign financing the provision restricts. If the provision restricts independent spending, or if it limits donations to committees engaged in such spending, the court is to apply exacting (i.e., strict) scrutiny, *see supra* Part III.C; if the provision restricts contributions to candidates, the court asks whether the restriction is "closely drawn to match a sufficiently important interest," *Shrink Missouri*, 528 U.S. at

387-88 (quotation omitted). No matter which standard of review is applied, the restriction passes constitutional muster only if it serves the government's interest in preventing the actual or apparent corruption of federal candidates and officeholders. *See NCPAC*, 470 U.S. at 496-97.

Returning to the text of BCRA's ban on corporate and labor disbursements for electioneering communications, *see generally supra* Part II.A, I believe that it cannot survive *Buckley*. The constitutionality of the ban turns, of course, upon the definition of "electioneering communication," which BCRA section 201 furnishes:

> The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A)(i); 2 U.S.C. § 434(f)(3)(A)(i). Because a knowing violation of BCRA can result in substantial fines and/or prison time, *see* BCRA § 312(a), FECA § 309(d)(1)(A), 2 U.S.C. § 437g(d)(1)(A), any careful corporation or labor union will want to know what "refers to" means before it expends money to broadcast



*any* political communication within two months of an election. But BCRA does not define "refers to" or otherwise describe the communications that are covered.

On its face, then, the term "electioneering communication" can include any near-election communication that merely *mentions* a clearly identified candidate (whether by name or not). Indeed, under one common dictionary definition of "refer," BCRAprohibits near-election disbursements for broadcast communications "relative to" a given candidate. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1907 (1993) (including "relate" as synonym of "refer"). But "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41. The synonym "refers to," then, suffers from the same flaw. And just like the $1,000 expenditure limit at issue in *Buckley*, BCRA section 203 would appear to prohibit (through BCRA section 201) near-election corporate and union broadcasting of both express advocacy *and* issue advocacy, an overbroad regulation that the First Amendment will not tolerate. *See Buckley*, 424 U.S. at 40-44, 80.

It must be determined, therefore, whether BCRA sections 201 and 203 are "readily susceptible [of] a narrowing construction that would make [them] constitutional." *Am. Booksellers*, 484 U.S. at 397 (quotation omitted). One way to get the provisions over the express advocacy hurdle of *Buckley* would be, of course, to limit their application "to communications that include explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43. When read as a whole,[146] however, the statute will not bear such a

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[146] The Supreme Court's "whole act rule" reminds reviewing courts that "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n v. Timbers of Inwood Forest*

construction. The wording—indeed the very inclusion in the statuteof the fall-back definition informs any interpretation of the primary definition:

> If [the primary definition] is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for [Federal] office (*regardless of whether the communication expressly advocates a vote for or against a candidate*) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii) (emphasis added). I presume the Congress would not have inserted the fall-back definition if it did not believe the provision would "support the regulation provided" by section 203 and effectuate the same legislative purpose as the primary definition. *Cf. Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 182 (1989) (similar provisions should be read *in pari materia*). The text of the alternate definition, as well as the rest of BCRA section 201, reveals that the legislative purpose is to reduce what the Congress believes to be the corrupting influence of issue ads that affect elections but do *not* expressly advocate a vote for or against a candidate. Notably, section 201 enumerates several exceptions to both definitions but does not exempt issue advocacy,[147] *see* BCRA

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*Assocs.*, 484 U.S. 365, 371 (1988); *see* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 263 (2000).

[147] *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (*"Expressio unius est exclusio alterius."*).



§ 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B), and it precludes the FEC from exempting from either definition

> [any] public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (*regardless of whether the communication expressly advocates a vote for or against a candidate*)[.]

BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (emphasis added); *see* BCRA § 201(a); FECA § 304(f)(3)(B)(iv); 2 U.S.C. § 434(f)(3)(B)(iv). The legislative history—to which the defendants extensively refer—bolsters the conclusion that the Congress sought to regulate issue advocacy, not to have it read out of the primary definition: The Shays-Meehan bill [provides] a reasonable solution to the problem of unlimited and undisclosed advertising that fails to qualify as "express advocacy" under federal election law, even though it clearly is designed to influence the outcome of an election. . . . Since these ads stop just short of using the magic words [of express advocacy], their sponsors are not subject to full public disclosure, the ads need carry no disclaimer, and they may be paid for with unlimited dollars from any source. . . . [The bill] addresses the problem[.]

H.R.REP.NO. 107-131, pt. 1, at 50 (2001) (minority views); *see, e.g.*, 147 CONG. REC. S3118 (daily ed. Mar. 29, 2001) (statement of Sen. Specter) ("If left unchecked, the explosive growth in the number and frequency of advertisements that are clearly intended to influence the outcome of Federal elections yet are masquerading as issue advocacy has the potential to undermine the integrity of the electoral process."); 147 CONG. REC. S2457 (daily ed. Mar. 19,

2001) (statement of Sen. Snowe) (discussing need to regulate electioneering communications because candidates and interest groups "believed the nonmagic words . . . were more effective in getting their campaign message across" than was express advocacy); *see generally* Intervenors Br. at 75 et seq. (detailing at length "the legislative history . . . regarding sham 'issue' ads run by corporations, unions, and other interest groups" (capitalization altered)). Accordingly, because the primary definition is not "readily susceptible" of a narrowing construction that would limit its applicability to express advocacy only, this panel cannot undertake to interpret it in a way that will save it from invalidation. *Am. Booksellers*, 484 U.S. at 397 (quotation omitted); *see Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996) ("Neither lawyers nor judges serve as back-seat lawmakers who may extend statutes beyond their bounds or change the rules that Congress has set."). When read together with the rest of the statute, the primary definition is impermissibly overbroad; while we do not know with precision what its boundaries are, we do know that it prohibits near-election issue advocacy and that, therefore, its "very existence may cause [persons] not before the court to refrain from [that form of] constitutionally protected speech." *Broadrick*, 413 U.S. at 612; *see Perry*, 231 F.3d at 160-62; *Vt. Right to Life Comm.*, 221 F.3d at 386.

BCRA's alternate definition of "electioneering communication" is constitutionally flawed as well; it states explicitly that it includes any broadcast communication (not merely one broadcast near election time) that "supports" or "opposes" a candidate but does not expressly advocate "a vote for or against [the] candidate." BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). For reasons I have already stated, the First Amendment will not tolerate regulation of independent issue advocacy, even if (or, perhaps, especially if) intended to influence a federal election. *See Renne*, 501 U.S. at 349 (Marshall, J., dissenting).



But suppose I am wrong about *Buckley*. Even if the express advocacy test is not constitutionally required, BCRA's ban on corporate and labor disbursements for electioneering communications nonetheless fails First Amendment review because it prohibits too much political speech and not enough corruption. Section 203 forbids any corporation or labor organization to *spend* anyfunds on any electioneering communication. *See* BCRA § 203; FECA § 316(a), (b)(2); 2 U.S.C. § 441b(a), (b)(2). Because the provision restricts spending, it must satisfy strict scrutiny—that is, it must serve a compelling governmental interest and do so in a narrowly tailored way. It does neither.

First, section 203 fails to serve a compelling governmental interest. To be clear, I do not deny that preventing the mere *appearance* of corruption is a compelling interest under the Supreme Court's case law.[148] *See, e.g., Shrink Missouri*, 528

[148] The Court has not settled on a precise definition of "corruption." Some of its cases suggest that the government's interest in preventing corruption is limited to *quid pro quo* arrangements, while others speak more broadly in terms of "improper influence." *Compare Shrink Missouri*, 528 U.S. at 389 ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized [in *Buckley*] a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."), *with id.* at 422 (Thomas, J., dissenting) (Court in *Buckley* "repeatedly used the word 'corruption' in the narrow *quid pro quo* sense, meaning '[p]erversion or destruction of integrity in the discharge of public duties by bribery or favour'" (quoting 3 OXFORD ENGLISH DICTIONARY 974 (2d ed. 1989))), *and NCPAC*, 470 U.S. at 497 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors."). *Amici* Cato Institute and the Institute for Justice argue cogently that, given the First Amendment interests at stake, the panel should be careful to define precisely and narrowly the government's interest in preventing "corruption." *See* Br. of *Amici Curiae* Cato Institute et al. at 2, 16-21. Because I believe BCRA does not serve to prevent actual or apparent "corruption" even in the broadest sense of the word, however, I also believe the panel need not decide today on a precise definition.

U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."). Yet even if I were to accept as a fact that corporate and labor disbursements for electioneering communications corrupt or appear to corrupt federal candidates—and I do not, *see supra* Finding 54b at pages 127-28—it would not necessarily follow that BCRA provides the solution. *See Turner*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that . . . the regulation will in fact alleviate these harms *in a direct and material way*." (citations omitted) (emphasis added)).

Under either of the definitions contained in section 201, "electioneering communication[s]" include only "broadcast, cable, or satellite communication[s]." BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A). Thus, any print, direct mail or internet advertisement—even a "targeted" one that refers to a clearly identified candidate, is made within 60 days before a general election and is *intended to influence* the election—gets "a free pass." NRA Br. at 34; *see* 67 Fed. Reg. at 65,196 ("[E]xemption[s] include[ ] communications appearing in print media, including a newspaper or magazine, handbills, brochures, bumper stickers, yard signs, posters, billboards, and other written materials, including mailings; communications over the Internet, including electronic mail; and telephone communications."). With television and radio "electioneering" foreclosed, corporations and unions wishing to "exploit" BCRA's "loopholes" for "sham" issue advertising to "distort" federal elections will have every incentive, and the means, to do so through print and electronic media. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999) ("[E]very reform effort to constrain political actors



produces a corresponding series of reactions by those with power to hold onto it."). Moreover, to the extent issue advertising may corrupt federal candidates, it is no less corrupting when disseminated through exempted print and electronic channels. As the NRA points out,

> [n]ewspaper advertisements often dwarf radio advertisements in terms of their expense, potency, and overall impact upon the public, particularly the *voting* public; they therefore promise to "spread by other means" the same electioneering speech, to the same mass audience, that was supposedly of utmost concern to Congress. . . . Thus, a corporation such as the Campaign for America may run a full-page political ad in the *New York Times* at a cost of $65,000, whereas a radio broadcast reciting the same text in a small market such as Peoria would cost a grand total of $75. The notion that only the latter expenditure implicates a concern about political corruption is preposterous.

NRA Br. at 35 (citation and footnotes omitted) (emphasis in original); *see also Reno v. ACLU*, 521 U.S. 844, 853 (1997) (internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers [and] viewers"). It does not "require a wild flight of imagination," *McCain v. Lybrand*, 465 U.S. 236, 254 (1984), to envision that the very same "sham" ads that aired on television in the past election will be webcast, telemarketed, postmarked, e-mailed or prominently displayed in the Sunday newspaper in the next. *See supra* Findings 54a.1-54a.3 at pages 12

And not only will the same ads be seen and heard everywhere else, they will *still* be aired on the television and the radio; the only difference is that they will be sponsored by a smaller (and less diverse) class of privileged speakers. *See supra* Finding 54a at pages 124-27. BCRA does not prohibit wealthy individuals, PACs or unincorporated associations

from making disbursements for electioneering communications. *See* BCRA § 203(a); FECA § 316(a), (b)(2); 2 U.S.C. § 441b(a), (b)(2). Nor does it prohibit media corporations from endorsing specific candidates by name, at any time, expressly or through "sham" editorializing. *See* BCRA § 201(a); FECA § 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i) (exempting from coverage "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station"). "This means that the Disney Corporation may through its subsidiary ABC (or General Electric through NBC) broadcast the very same 'electioneering communications' that Congress has forbidden the NRA from funding." NRA Br. at 39.

The statute's underinclusion, in my view, is fatal to BCRA's ban on corporate and labor disbursements for electioneering communications. Although campaign finance legislation "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Buckley*, 424 U.S. at 105 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)), even an incremental restriction on campaign expenditures must serve a compelling governmental interest. BCRA's ban on corporate and labor electioneering falls short of the mark; its underbreadth "diminsh[es] the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *see also White*, 122 S. Ct. at 2537, 2539 (restriction prohibiting candidate for judicial office from announcing his political views—but "only at certain times and in certain forms"—failed strict scrutiny because it was "so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous"). While BCRA's sponsors may have intended the ban to be a first step only, *see, e.g.*, Press Release, Senator John McCain, McCain Declares Reform Crusade Continues (November 14, 2002) ("Reform is a process. It is not a one-time fight."), *available at* http://mccain.senate.gov/, its



negligible utility in battling corruption or its appearance cannot justify the statute's ham-handed regulation of core First Amendment activity.

Even were I convinced that the ban served the government's interest in preventing the actual or apparent corruption of federal candidates and officeholders, it would not do so narrowly enough. The fact that an ad is aired within 60 days of a general election and mentions a federal candidate may in many instances suggest that the ad is designed to affect the electorate's view of that particular candidate.[149] Yet that fact alone does not justify prohibiting disbursements for the ad. *See Bellotti*, 435 at 790 ("[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it [.]''). Nor does that fact alone establish that the ad raises a danger of corrupting, or of appearing to corrupt, the target candidate. Money and ads *themselves* are not a corruption of the system; instead, "a subversion of the political process" occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *NCPAC*,

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[149] The parties quarrel at length over what percentage of "genuine" issue ads--ads not intended to influence the outcome of a federal election—BCRA's electioneering provisions would prohibit. Two studies upon which the defendants and the statute's sponsors place considerable weight suggest that BCRA would have prohibited between one per cent and seven per cent of any "genuine" issue ads aired during the 1998 and 2000 elections. *See generally Buying Time 2000; Buying Time 1998*. Yet neither study has any significant evidentiary weight. *See supra* Findings 43e-43h at pages 88-99. Moreover, like the *McConnell* plaintiffs, I reject the studies' distinction between "genuine" issue advocacy and "sham" issue advocacy because it is "subjective, immune to empirical proof, and totally antithetical to *Buckley*." McConnell Br. at 66 n.29. Finally, even if I accepted the distinction, the record as a whole suggests that BCRA would prohibit too much protected expression—anywhere from 11.38 per cent to 50.5 per cent of (what even the defendants characterize as) "genuine" issue ads broadcast during the 60 days before an election in a typical election year. *See supra* Findings 43f-43h, 51d at pages 90-99, 109.

470 U.S. at 497. That a particular ad may influence the outcome of an election does not mean it will influence the legislative actions or positions of the candidate it supports or opposes. In many instances, a victorious candidate may not know which groups funded ads that sunk his opponent; plainly, then, he could hardly feel obligated to those groups. More importantly, many organizations support candidates with electioneering ads because they believe, often correctly, that the candidate will share their legislative agenda once he is elected or reelected *whether or not* they have "infus[ed]" his campaign with money. In short, they want him to win simply because, in their view, he best represents them. *See Colorado Republican I*, 518 U.S. at 640 (Thomas, J., conurring in judgment and dissenting in part) (groups "spend money in support of . . . candidates . . . because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy"). BCRA's electioneering provisions ignore the simple fact—acknowledged by the defense—that advertising disbursements often follow a candidate's legislative preferences, not the other way around. *See* Cross Exam. of Def. Witness Bok at 19 (testifying that in contribution context, legislators' roll call "votes influence the gifts rather than the gifts influencing the votes").

Additionally, BCRA's ban on corporate and labor disbursements for electioneering communications is not narrowly tailored because it extends to non-profit and political advocacy corporations. In *MCFL*, the Court held that a nonprofit advocacy corporation which poses no danger of "unfair deployment of wealth for political purposes" cannot constitutionally be prohibited from making expenditures even for *express* advocacy.[150] *MCFL*, 479 U.S. at 259. The Wellstone

[150] The Court considered three factors in deciding that MCFL could "not constitutionally be bound by [2 U.S.C.] § 441b's restriction on independent spending," *MCFL*, 479 U.S. at 263-64: (1) the corporation "was formed for the express purpose of promoting political ideas, and [could] not engage in business activities," *id.* at 264; (2) no "persons connected with the organization [would] have [an] economic disincentive for disassociating with it if they disagree with its political activity," *id.*; and (3) it "was not established by a business corporation or a labor union, and it [was] its policy not to accept contributions from such entities," *id.*



Amendment (BCRA section 204) prevents any such corporation, from the ACLU to the NRA to MCFL itself, from making a disbursement for any electioneering communication. *See* BCRA § 204; FECA § 316(c)(6)(A), (B); 2 U.S.C. § 441b(c)(6)(A), (B); *see also supra* Part II.A (explaining operation of Wellstone Amendment). The government contends that the prohibition's extension to non-profits "does not impair its constitutionality," citing the Court's decision in *Austin*:

> The Supreme Court's decision in *Austin* is dispositive. In that case, the Michigan Chamber of Commerce, a nonprofit corporation, challenged a statute which, like FECA § 441b, required for-profit and nonprofit corporations alike to make independent expenditures through a separate segregated fund. In upholding the statute, the Court rejected the argument that the statute was "overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital." . . . The Court found that, due to the "special benefits conferred by the corporate structure," all corporations present the potential to distort the electoral process . . . .

Gov't Br. at 165 (citations omitted). Before the Court in *Austin*, as in *MCFL*, was a limit on expenditures disbursed for *express* advocacy and, were a similar limit before us here, the government's argument would be more persuasive. But BCRA restricts near-election *issue* advocacy. The claim that organizations like the ACLU—which "has never taken a position in a partisan political election" and relies almost exclusively on individual membership dues, ACLU Br. at 2-3

& n.2; *see supra* Finding 44e at pages 100-01—corrupt or appear to corrupt particular federal candidates with non-partisan, issue-based ads is an "undifferentiated fear" insufficient to justify BCRA's overreach in curtailing protected speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression."); *see FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (under First Amendment as interpreted in *MCFL* and *Austin*, government "must demonstrate that the recited harms are real, not merely conjectural" (quoting *Turner*, 512 U.S. at 664)).

* * *

I would hold, therefore, that BCRA sections 201, 203 and 204 are facially invalid because they are overbroad under *Buckley* and cannot pass strict scrutiny in any event.[151] Corporations and unions no less than individuals are entitled to spend money for the sake of engaging by broadcast in "uninhibited, robust, and wide-open ... [d]iscussion of public issues and debate on the qualifications of candidates," *Buckley*, 424 U.S. at 14; *see Bellotti*, 435 U.S. at 776-77, *especially* during the weeks immediately preceding an election, *see Mills*, 384 U.S. at 219 (Alabama statute prohibiting newspaper editor from publishing election day editorial urging particular outcome on ballot measure unconstitutional because it "silence[d] the press at a time when it [would] be most effective"); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1972) (emphasizing need to protect "speech about how we are governed," including "a wide range of evaluation,

[151] In light of this disposition, I would not reach the *McConnell, NRA, Chamber of Commerce, NAB* and *AFL-CIO* plaintiffs' equal protection claims or the *Paul* plaintiffs' claim that the provisions "abridge[ ] the freedom of the press by imposing discriminatory editorial control upon [their] press activities." Paul Br. at 21 (capitalization altered).



criticism, *electioneering* and propaganda" (emphasis added)); *see generally* Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It is Least Valuable, It Cannot Be Regulated When It is Most Valuable*, 50 CATH. U.L. REV. 65 (2000).

*B. Disclosure and Reporting Requirements*

The Supreme Court in *Buckley* took pains to emphasize that provisions requiring disclosure and reporting of election-related disbursements are no less the subject of First Amendment concern than are restrictions on the disbursements themselves. *See Buckley*, 424 U.S. at 64. Indeed, the Court recognized that in some circumstances

> compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the inter ests which Congress has sought to promote by [its] legislation.

*Id.* at 64, 68 (citations omitted). It is well-established, therefore, that the government's interests in mandating disclosure "must survive exacting scrutiny." *Id.* at 64 & n.73 (citing *NAACP v. Alabama*, 357 U.S. at 463; *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. at 438; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)). The Court in *Buckley* found three governmental interests sufficiently compelling to support FECA's disclosure and reporting provisions:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters

in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. . . . Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the [Act's] contribution limitations.

. . .

*Buckley*, 424 U.S. at 66-68 (footnotes and citations omitted).[152] BCRA's disclosure and reporting provisions, however, are far more intrusive than the requirements upheld in *Buckley*. Sections 201, 311 and 504 require disclosure and reporting not of expenditures and contributions "made for the purpose of influencing" a federal election but of disbursements for "electioneering communications" and of requests to broadcast communications "relating to any political matter of national importance." My belief that *Buckley's* express advocacy test is constitutionally required, *see supra* Part IV.A, leads me to conclude that these provisions impermissibly abridge protected speech by inhibiting in an overbroad fashion the airing of near-election broadcasts containing only issue advocacy. Furthermore, I do not believe that the provisions serve any of the three interests discussed in *Buckley;* I would hold, therefore, that they cannot survive "exacting scrutiny" in any event. Finally, I would likewise invalidate BCRA section 212, which places advance reporting requirements on independent expenditures; although the provision limits only express advocacy, it imposes an unconstitutional prior restraint.

[152] Acknowledging these benefits, even critics of recent campaign finance proposals have suggested that *carefully constructed* reporting provisions would be the least problematic method of regulating campaign spending and giving. *See, e.g.*, Gora, *supra*, at 892 & n.103 (explaining ACLU's support for "disclosure of large contributions to mainstream party candidates"); Issacharoff & Karlan, *supra*, at 1736-37.



* * *

A complete examination of BCRA's disclosure and reporting requirements must first consider the D.C. Circuit's unanimous holding in *Buckley* invalidating one of FECA's reporting requirements, then codified at 2 U.S.C. § 437a,[153] as unconstitutionally vague and overbroad. *See Buckley*, 519

[153] Section 437a, which was strikingly similar to BCRA's electioneering disclosure requirements, provided in part that

> [a]ny person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports . . . set[ting] forth the source of the funds used in carrying out any activity described in [this] sentence in the same detail as if the funds were contributions within the meaning of [the Act], and payments of such funds in the same detail as if they were expenditures within the meaning of [the Act].

*Buckley*, 519 F.2d at 869-70.

F.2d at 869-78. Because the government did not appeal the holding, *see Buckley*, 424 U.S. at 10 n.7, it remains controlling authority for this court to this day:

> Section 437a, with a "purpose of influencing" and a "design[ ] to influence" [federal elections] as criteria undertaking to partially shape its operation, does not meet the governing [vagueness and overbreadth] standards. These criteria do not mark boundaries between affected and unaffected conduct with narrow specificity; they do not clearly inform . . . [of] what is being proscribed. Rather, they leave the disclosure requirement open to application for protected exercises of speech, and to deterrence of expression deemed close to the line. Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. In this milieu, where do "purpose" and "design[ ]" "to influence" draw the line? . . . [W]hile we have continued our struggle for an interpretation of section 437a which might bypass its vagueness and overbreadth difficulties, we have been unable to [find one].

*Buckley*, 519 F.2d at 875 (quotations omitted). The appeals court's recognition that the imprecise disclosure requirement intolerably chilled protected issue advocacy is notable given that the court upheld every other provision of FECA (including its expenditure limitations). Its observations about section 437a foreshadowed the Supreme Court's subsequent holding that the FECA provision requiring disclosure by individuals making contributions or expenditures over $100 annually "other than by contribution to a political committee or candidate" could be salvaged only by construing it, like the



Act's $1,000 spending limit, "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80 & n.108

As I have discussed, the federal courts of appeals have reached a consensus that *Buckley's* express advocacy test is constitutionally required, whether in the context of disbursement ceilings or disclosure. *See supra* Part IV.A. They have held, and I agree, that any statute permitting issue advocacy only on the condition that the speaker submit to cumbersome disclosure and reporting requirements must be invalidated on the ground of overbreadth. *See Moore*, 288 F.3d at 190 (state disclosure provision could constitutionally extend only to political advertisements "advocat[ing] *in express terms* the election or defeat of a candidate" (emphasis in original)); *Davidson*, 236 F.3d at 1187, 1193-94 (same); *Perry v. Bartlett*, 231 F.3d at 162 (same); *Vt. Right to Life Comm.*, 221 F.3d at 386 (same); *cf. Talley v. California*, 362 U.S. 60, 65 (1960) (finding "void on its face" ordinance barring distribution of any handbill that did not contain name and address of writer and distributor); *Thomas*, 323 U.S. at 539 ("As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."). As a noted law professor has put it, "the *Buckley* bottom line" is that

> [w]hile independent expenditures for speech that expressly advocates the election or defeat of a clearly identified candidate—i.e., expenditures for "express advocacy"—may not be limited in amount, such spending may be subjected to disclosure requirements. [But] [e]xpenditures for speech that does *not* expressly advocate the election or defeat of a candidate—i.e., expenditures for issue advocacy—may neither be limited in amount *nor* subjected to disclosure requirements.

BeVier, *Issue Advocacy*, *supra*, at 1769 (emphases added). Thus, BCRA's disclosure requirements are subject to a doctrinal framework similar to the one I applied to the statute's ban on corporate and labor disbursements for electioneering communications. *See supra* Part IV.A. That is, if by its vagueness a disclosure requirement appears to stifle both express advocacy and issue advocacy, the reviewing court must (if possible) construe the provision narrowly to apply only to the former and not the latter. *See Buckley*, 424 U.S. at 80. If the requirement is not readily susceptible of such a construction— and thereby causes individuals and entities to refrain from engaging in constitutionally protected issue advocacy, *see Broadrick*, 413 U.S. at 612—the reviewing court will strike down the provision as overbroad. *See, e.g., Perry*, 231 F.3d at 161-62. Even if a provision can be construed to require disclosure of express advocacy only, it is subject nonetheless to "exacting scrutiny." *Buckley*, 424 U.S. at 64; *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 202 (1999) ("[E]xacting scrutiny is necessary when compelled disclosure of campaign-related payments is at issue." (quotations omitted)). Under that standard of review, a court must determine whether a given requirement is narrowly tailored—i.e., whether there exists a "substantial relation" between, on the one hand, the government's "subordinating interests" in informing the electorate and preventing corruption, and, on the other, "the information required to be disclosed." *Buckley*, 424 U.S. at 64 (quoting *Gibson*, 372 U.S. at 546). I note, as the Supreme Court has noted, that such scrutiny is warranted "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

Sections 201, 311 and 504 fail the express advocacy test. Section 201 requires any person who makes, or contracts to make, "a disbursement for the direct costs of producing and



airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" to file within 24 hours after making each disbursement (or entering a contract to make a disbursement) a statement containing: the person's name and, in some instances, the person's address; the person's place of business, if the person is not an individual; the amount disbursed; the names of recipients; and the election to which the communication pertains. BCRA § 201(a); FECA § 304(f)(1), (2); 2 U.S.C. § 434(f)(1), (2). All of these details are then made public on the internet, at the FCC's website. *See* BCRA § 201(b); FECA § 304 note; 2 U.S.C. § 434 note. Section 311 amends the Act to mandate that "whenever any person . . . makes a disbursement for an electioneering communication," the communication *itself* must state whether it was authorized by a candidate and, if it was not, it must "clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication." BCRA § 311; FECA § 318(a); 2 U.S.C. § 441d(a); *see supra* note 39 (discussing section 311). Along the same lines, section 504 requires broadcast licensees to "maintain, and make available for public inspection, a complete record" of any "request" of any person "to purchase broadcast time" for communications "relating to any political matter of national importance." BCRA § 504; FCA § 315(e)(1); 47 U.S.C. § 315(e)(1). Many, if not most, communications "relating to any political matter of national importance" do not contain words expressly advocating the election or defeat of a candidate. And both of BCRA's definitions of "electioneering communication" sweep within their purview ads that do not expressly advocate the election or defeat of a candidate. *See supra* Part IV.A. Thus does section 201 require individuals spending funds on issue ads independent of a candidate's campaign to jump through a set of hoops that *Buckley* held could be required only of express advocates. Thus does section 311 require that disclosure be included in protected issue ads themselves. And

thus does section 504 attach disclosure requirements to issue advocacy sent over the airwaves. Under *Buckley*, these provisions are unconstitutionally overbroad unless they can reasonably be construed to apply only to express advocacy.

Limiting the application of sections 201, 311 and 504 (if possible) to express advocacy is mandated not only by *Buckley* but by the Framers' intention—confirmed by long-standing tradition—to protect the right to express one's views on political issues and candidates anonymously and without fear of retaliation. *See McIntyre*, 514 U.S. at 343 & n.6 (First Amendment "embrace[s] a respected tradition of anonymity in the advocacy of political causes" (citing, *inter alia*, ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA 220 (J. Faragher ed. 1990); 2 THE COMPLETE ANTI-FEDERALIST (H. Storing ed. 1981))); *see also id.* at 369 (Thomas, J., concurring in judgment) ("Records from the first federal elections indicate . . . that anonymous political pamphlets and newspaper articles remained the favorite media for expressing views on candidates." (citing, *inter alia*, 15 PAPERS OF JAMES MADISON 66-73 (T. Mason, et al. eds. 1985); 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 246-362 (M. Jensen & R. Becker eds. 1976); 15 PAPERS OF ALEXANDER HAMILTON 33-43 (H. Syrett ed. 1969))); *Talley*, 362 U.S. at 65 (because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance," the state in certain circumstances "may not compel members of groups engaged in the dissemination of ideas to be publicly identified"). In striking down an Ohio statute that required the writer of any campaign literature tending to influence the outcome of an election to include his name on the material itself, the Court in *McIntyre* reaffirmed that *Buckley's* approval of disclosure requirements has no application to issue advocacy independent of a candidate's campaign, especially if such advocacy is anonymous. *See McIntyre*, 514 U.S. at 354; *Buckley*, 424 U.S. at 80. But, plainly, neither of BCRA's definitions of "electioneering communication" can be interpreted reasonably to exclude protected issue advocacy. *See supra* Part IV.A. Nor can "any political matter of national importance" be construed fairly to exclude issue advocacy. Accordingly, sections 201, 311 and 504 run afoul of the First Amendment.



Even if *Buckley's* express advocacy test were not constitutionally required, sections 201, 311 and 504 would not survive "exacting scrutiny" because they do not serve any of the three "subordinating interests" mentioned in *Buckley*. The provisions make no distinction between independent issue advocacy and advocacy coordinated with a candidate. To the extent that a corporation, union or individual *independently* disburses funds for an electioneering communication, the government's interest in preventing corruption is lacking because the requisite arrangement of, or even opportunity for, a *quid pro quo* is lacking. *See Buckley*, 424 U.S. at 47 (independent disbursements and ads "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"); *see also Colorado Republican I*, 518 U.S. at 615 (plurality opinion) ("[T]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitmentsfrom the candidate." (quoting *Buckley*, 424 U.S. at 47)); *Buckley*, 519 F.2d at 873 ("[I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes."). Similarly absent in the independent electioneering context is the government's interest in informing the electorate about how political funds are spent by the candidate,

*see Buckley*, 424 U.S. at 66, because the funds disbursed are not given to, coordinated with or spent by the candidate himself. Also attenuated is the government's interest in informing the electorate by "alert[ing] the voter to the interests to which a candidate is most likely to be responsive." *Id.* at 67. The bare fact that an individual or organization disburses funds to broadcast an advertisement "referring to" a particular candidate does not, without more, lead a voter to a confident conclusion that the candidate (or his opponent) will be "responsive" to the interests of that individual or organization. Therefore, to put the matter as the Court did in *McIntyre*,

> [i]nsofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a [communication], we think the identity of the speaker is no different from other components of the [communication's] content that the [speaker] is free to include or exclude. . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that a [speaker] make statements or disclosures she would otherwise omit.

*McIntyre*, 514 U.S. at 348.

The reporting requirements contained in BCRA section 212, relating to independent expenditures, are infirm for a different reason. Section 212 requires any person (including any individual) who disburses more than $1,000 in "independent expenditures" within 20 days of an election, or more than $10,000 in "independent expenditures" at any time up to and including the twentieth day before an election, to file with the FEC a "report" specifying: the name and address of any recipient of any expenditure; the date, amount and purpose of any expenditure; and the name of, and office sought by, the candidate supported or opposed by the expenditure.



*See* BCRA § 212(a); FECA § 304(g), (b)(6)(B)(iii); 2 U.S.C. § 434(g), (b)(6)(B)(iii). As amended by BCRA section 211, the Act defines "independent expenditure" to include

> an expenditure by a person—
>
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

BCRA § 211; FECA § 301(17); 2 U.S.C. § 431(17). Because section 212 requires reporting of express advocacy only—reporting that sufficiently serves anti-corruption and informational interests—it is fully consistent with *Buckley*. Because it is not consistent with the First Amendment's prohibition on prior restraint, however, it cannot be sustained.

Under section 212, reports regarding independent expenditures made within 20 days of an election must be filed with the FEC within 24 hours "after each time [a] person makes or *contracts to make* [such] expenditures." BCRA § 212(a); FECA § 304(g)(1); 2 U.S.C. § 434(g)(1) (emphasis added). Reports on independent expenditures made at any time up to and including the twentieth day before the election must be filed with the FEC within 48 hours "after each time [a] person makes or *contracts to make* [such] expenditures." BCRA § 212(a); FECA § 304(g)(2); 2 U.S.C. § 434(g)(2) (emphasis added). These deadlines—which in many instances will require reporting of expenditures not yet made—are constitutionally problematic. Consider two recent cases from other circuits. In *Davidson*, the Tenth Circuit struck down a Colorado statute that required "[a]ny person making an independent expenditure in excess of [$1,000]" to notify the secretary of state and each candidate in the race—and to forward thereto a detailed description of the expenditure—

"within twenty-four hours after obligating [the] funds." *Davidson*, 236 F.3d at 1196 & n.9. Although the court acknowledged that "[a] state may constitutionally require that independent expenditures be reported to some governmental entity and made available to the public," *id.* at 1197 (citing *Buckley*, 424 U.S. at 80-81), it nonetheless invalidated the statute because of the "patently unreasonable" 24-hour notice requirement:

> To require such immediate notice severely burdens First Amendment rights, and the provision is a far cry from being narrowly tailored. None of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline.

*Id.* Likewise, in *Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137 (M.D. Fla.), a Florida district court struck down a state statute requiring any individual or organization "making an independent expenditure in excess of $1,000 on behalf of or in opposition to a candidate" to provide notice and a general description of the expenditure to every candidate in the race. *Id.* at * 8 (quotation omitted). Under the law, "[a]n expenditure [was] obligated upon the purchase of any political advertising or the *entering into any agreement* . . . to purchase any political advertising." *Id.* (quotation omitted) (emphasis added). While the district court recognized that *Buckley* "upheld an after-the-fact reporting requirement for independent expenditures," *id.*, it nonetheless found the law unconstitutional because "[t]he requirement of giving advance notice to the government of one's intent to speak inherently inhibits free speech," *id.* (quotation omitted), and because "a prior disclosure requirement is not necessary to satisfy the state's interests, as articulated by the *Buckley* Court," *id.*



These cases are consistent with the Supreme Court's longstanding declaration that advance reporting and registration requirements are "quite incompatible with the requirements of the First Amendment." *Thomas*, 323 U.S. at 540; *see generally Watchtower Bible & Tract Soc'y, Inc. v. Stratton*, 122 S. Ct. 2080 (2002) (striking down ordinance requiring individuals to obtain permit prior to engaging in door-to-door advocacy). BCRA section 212 is similarly "incompatible with the requirements of the First Amendment"; while this panel "cannot substitute [its] own judgment for that of the legislature as to a more appropriate and reasonable time frame," *Davidson*, 236 F.3d at 1197, it should be able to say with confidence that the provision's advance disclosure requirements are not necessary to serve the government's subordinating anti-corruption, informational and enforcement interests.[154] *See Wis. Realtors*, 2002 WL 31758663, at *11-*12 (Wisconsin statute prohibiting

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[154] *Davidson* makes clear that even if the phrase "or contracts to make" is read out of section 212 in an effort to save the provision--which would itself be a dubious proposition, *see, e.g., Erznoznik*, 422 U.S. at 216 (statute must be "easily susceptible" of narrowing construction)--the provision would nonetheless fail exacting scrutiny because of its "patently unreasonable" 24- and 48-hour notice requirements. *Davidson*, 236 F.3d at 1197. The defendants do not explain how such a short time frame is even related--much less narrowly tailored—to serving the governmental interests that *Buckley* recognized. Instead, they argue that the FEC has rendered the prior restraint problem moot by issuing "regulations [that] interpret [BCRA's disclosure] provisions not to require disclosure until after 'the date on which a communication is publicly distributed.'" Gov't Opp. Br. at 111 (quoting BCRA Reporting, 67 FED. REG. 64,555, 64,565-66 (Oct. 21, 2002)). Even assuming the regulations can be sustained as a reasonable interpretation of section 212 with respect to prior disclosure, neither the FEC nor this court is free to disregard the plainly mandated and plainly unconstitutional 24- and 48-hour notice requirements. *See Davidson*, 236 F.3d at 1197; *see also Locke*, 471 U.S. at 96 ("We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.))).

group from sponsoring communication featuring candidate within 30 days of election "unless it has filed a report detailing the name of each candidate who *will be* supported or whose opponent *will be* opposed and the total disbursements *to be* made" violated First Amendment (quotation omitted) (emphasis in original)). As the AFL-CIO points out, the provision's advance deadlines will serve only to "chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies" and to "giv[e] adversaries the opportunity to . . . thwart broadcasts." AFL-CIO Br. at 16; *see supra* Findings 48, 52d, 53g-53i at pages 105, 114-15, 123-24. Accordingly, I believe that section 212 cannot stand.

* * *

I would hold that the disclosure and reporting requirements included in sections 201, 311 and 504 are facially invalid because they are overbroad under *Buckley* and cannot withstand "exacting scrutiny" in any case. I would find as well that section 212 is facially invalid because it imposes an impermissible prior restraint and is not narrowly tailored to serve the government's interests in preventing corruption and informing the electorate.[155]

*C. Limits on "Coordinated Expenditures"*

I have thus far concluded that the Congress may not regulate issue advocacy by banning, or attaching disclosure and reporting requirements to, independent disbursements on "electioneering communications." *See supra* Parts IV.A and IV.B. In the following paragraphs, I conclude that BCRA

[155] In light of this disposition, I would not reach the *Paul* plaintiffs' claim that BCRA's disclosure provisions "abridge[ ] the freedom of the press by imposing discriminatory editorial control upon [their] press activities." Paul Br. at 21 (capitalization altered).



sections 202, 213 and 214 are facially invalid because, by defining "coordinat[ion]" in an overbroad way, they tote the same impermissible restrictions through the back door.

* * *

BCRA section 202 treats as a "contribution"—and therefore subjects to the Act's source-and-amount limits and disclosure requirements—any disbursement made by any person for any electioneering communication where "such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal [sic], State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee." BCRA § 202(2); FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C); *see supra* text accompanying notes 25-29 (detailing several of FECA's source-and-amount limits). Section 202 therefore prohibits, *inter alia:* (1) any corporation or labor organization from disbursing any amount for a "coordinated" electioneering communication, *see supra* note 29 and accompanying text; and (2) any individual from disbursing more than $2,000 per election for "coordinated" electioneering communications, *see supra* note 25 and accompanying text.

At first blush, these restrictions might not appear constitutionally suspect. With support from *Buckley* and *Colorado Republican II*, the defendants correctly point out that an expenditure arranged between the spending organization and the supported candidate raises the specter of *quid pro quo* corruption and, if unregulated, can subvert the Act's contribution limits. *See* Gov't Br. at 186- 89; Intervenors Br. at 135-36. In *Buckley*, the Court upheld a FECA provision treating as a contribution any expenditure "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate" because the provision "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 46-47 & n.53; *see FEC v.*

*Christian Coalition*, 52 F. Supp. 2d 45, 85 (D.D.C. 1999) (while *Buckley* introduced notion of coordinated expenditures" and, for constitutional analysis, treated such expenditures as contributions, it reserved for another day the task of defining "coordinated expenditures" for constitutional purposes). And in *Colorado Republican II* the Court sustained against a facial attack the Act's party expenditure provision, 2 U.S.C. § 441a(d), because "a [political] party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of [the Act's] contribution limits." *Colorado Republican II*, 533 U.S. at 465. The Court has recognized, however, that "coordinated expenditures . . . share some of the constitutionally relevant features of independent expenditures." *Colorado Republican I*, 518 U.S. at 624 (plurality opinion); *see id.* at 626-31 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 631-40 (Thomas, J., concurring in judgment and dissenting in part). Indeed, it has made clear that any coordinated expenditure analysis must "ultimately turn[ ]" on whether the regulated expenditures are "potential alter egos for contributions" or "functionally true expenditures, qualifying for the most demanding First Amendment scrutiny." *Colorado Republican II*, 533 U.S. at 463.

The statutory definition of "coordinat[ion]," then, is critically important; it must clearly and precisely draw a line between "alter ego" expenditures and "functionally true" expenditures. Because a bare *allegation* of coordination can subject any given spender to a series of costly and intrusive enforcement proceedings—whether the spender is in compliance with the law or not, *see* Smith Statement at 2 (cited in note 99, *supra*)—the definition "must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." *See*



*Christian Coalition*, 52 F. Supp. 2d at 88-89. That is, in the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in protected lobbying or speech activities. *See* 2 U.S.C. § 437g(a)(1), (2) (FEC authorized to investigate potential election law violations brought to its attention by private-party complaints); *supra* Findings 61b, 64b at pages 134-39; *see also* Chamber of Commerce Br. at 14 et seq. (explaining how "coordination allegations seriously burden and chill speech" (capitalization altered)). A properly-drawn definition is especially important where, as here, "coordinated expenditures" for *issue advocacy* are restricted—"as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the [government] cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate." *Clifton v. FEC*, 927 F. Supp. 493, 500 (D. Me. 1996), *modified on other grounds and remanded*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). But that is precisely what BCRA does.

Under the Act as amended by BCRA section 214, any electioneering disbursement made "in cooperation, *consultation*, or concert, with, or at the request or suggestion of" a candidate or his agents is thereby "coordinated" with the candidate and treated as a contribution thereto. BCRA § 214(a); FECA § 315(a)(7)(B)(i); 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). Likewise, any electioneering disbursement made in like fashion with a national, state or local committee of a political party is thereby "coordinated" with the committee and treated as a contribution thereto. *See* BCRA § 214(a); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii). BCRA section 214 repeals the FEC's

existing coordination regulation[156] and provides that any new regulations "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and an entity making a disbursement. *See* BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note. In accordance with section 214's mandate, the FEC recently promulgated a final rule on "coordinated communications." *See supra* Finding 57 at pages 129- 32; *see also supra* note 45 and accompanying text. The rule provides that a disbursement for an electioneering communication is "coordinated" with a candidate or political party committee—"whether or not there is agreement or formal collaboration" between the disburser and the candidate or committee—when (1) "[t]he communication is created, produced, or distributed at the request or suggestion" of the candidate or committee; (2) the candidate or committee "is materially involved in decisions regarding" the communication; or (3) "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication" between the disburser and the candidate or committee. *See* 68 Fed. Reg. at 453-55. Under the regulation, "[a]greement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination" and "[f]ormal collaboration means planned, or

[156] Before BCRA became effective, an expenditure for a communication was "coordinated" under 11 C.F.R. § 100.23(c)(2) if the communication was created, produced or distributed (1) "[a]t the request or suggestion of" the candidate or party; (2) after the candidate or party had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" resulting in a "collaboration or agreement" between the creator, producer, distributor or payer of the communication and the candidate or party regarding the content or distribution of the communication. *Supra* Finding 56 at pages 128-29 (quoting 11 C.F.R. § 100.23(c)(2)); *see* Gov't Br. at 183.



systematically organized, work on the communication." *Id.* at 455 (emphases omitted). Finally, the regulation purports to provide a "[s]afe harbor" for "responses to inquiries about legislative or policy issues":

> A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards . . . of this section.

*Id.*

The district court in this circuit recently confronted the question whether, and to what extent, the government may regulate "coordinated expenditures [on communications] not limited to express advocacy." *Christian Coalition,* 52 F. Supp. 2d at 86 (capitalization altered) (quotation omitted). The court's views on the matter are worth quoting at length:

> This Court is bound by both the result and the reasoning of *Buckley,* even when they point in different directions. While *Buckley* confidently assured that coordinated expenditures fell within the Act's limits on contributions, it also reasoned that spending money on one's own political speech is an act entitled to constitutional protection of the highest order. Expressive coordinated expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender. . . . I take from *Buckley* and its progeny the directive to tread carefully, acknowledging that *considerable* coordination will convert an expres sive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some *consultations* . . . with a federal candidate.

*Id.* at 91 (emphases added). Pointing to the *Christian Coalition* decision—and, more importantly, to the Supreme

Court's decision in *Colorado Republican I*—the plaintiffs argue that BCRA's coordination provisions are overbroad. *See, e.g.*, McConnell Br. at 82-85; Chamber of Commerce Br. at 11-14. I agree; many of the expenditures BCRA defines as "coordinated" are not "disguised contributions" of the sort described in *Colorado Republican II* and *Buckley*. *Colorado Republican II*, 533 U.S. at 443; *see Clifton*, 927 F. Supp. at 495, 499 (despite its contact with candidate to "seek explanation of particular votes or statements," Maine Right to Life Committee's publication of voting records and guides represented "direct issue advocacy" as opposed to "the mere third-party billpaying for a *candidate's* media advertisements or a volunteer's incidental expenses that *Buckley* was talking about when it treated coordinated spending as a contribution under different statutory language" (emphasis added)). Suppose, for example, that a corporation purchases broadcast time for an electioneering communication that does not expressly advocate the election (or defeat) of candidate Smith but, instead, favorably compares Smith's voting record on tax cuts to that of his opponent. Governed by "both the result and the reasoning of *Buckley*," *Christian Coalition*, 52 F. Supp. 2d at 91, I think it clear that the ad would "communicate the underlying basis for the [corporation's] support" of Smith. *Buckley*, 424 U.S. at 21. Just as significantly, the ad would provide the electorate with a degree of "knowledge of the comparative merits and demerits of the candidates for public trust," 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 575 (Jonathan Elliot ed. 1888) (hereinafter ELLIOT'S DEBATES) (eighteenth century speech of James Madison to General Assembly of Virginia), and would assist voters in "mak[ing] informed choices" about the candidates, *Buckley*, 424 U.S. at 14-15. If the corporation "consult[s]" with Smith's office before purchasing the ad—perhaps to confirm Smith's voting record and to ensure the ad's accuracy—does that fact, by itself, render the information in the ad less independent or less valuable as an



expression of a political position? I do not think so; the corporation's disbursement for the ad would constitute direct speech by the corporation itself and a "functionally true expenditure[ ] qualifying for the most demanding First Amendment scrutiny."[157] *Colorado Republican II*, 533 U.S. at 463; *see Clifton*, 927 F. Supp. at 499 (where "both the disbursements and the speech are *direct political speech by the [corporation]*, not by the candidate," they are "at the heart of the Court's First Amendment's concerns" notwithstanding their allegedly "coordinated" nature (emphasis in original)). Nor would the minimal "consultation" be "extensive enough to make the potential for corruption through legislative *quid pro quo* palpable." *Christian Coalition*, 52 F. Supp. 2d at 89. Yet without sufficient regard for the corporation's speech interest or the electorate's interest in information, BCRA restricts such a disbursement.

Evidently, the FEC envisioned this very scenario and was concerned that BCRA'sdefinition of coordination was overbroad—as I mentioned, the Commission in its final rule on "coordinated communications" attempted to provide a "[s]afe harbor" for "responses to inquiries about legislative or policy

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[157] The four dissenters in *Colorado Republican II* concluded similarly in the political party context:

> Take, for example, a situation in which the party develops a television advertising campaign touting a candidate's record on education, and the party simply "consult[s]," 2 U.S.C. § 441a(a)(7)(B)(i), with the candidate on which time slot the advertisement should run for maximum effectiveness. [We] see no constitutional difference between this expenditure and a purely independent one. In the language of *Buckley*, the advertising campaign is not a mere "general expression of support for the candidate and his views," but a communication of "the underlying basis for the support." . . . It is not just "symbolic expression," . . . but a clear manifestation of the party's most fundamental political views.

*Colorado Republican II*, 533 U.S. at 468 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

issues." 68 Fed. Reg. at 455. While sections 202 and 214 are indeed overbroad, *see infra*, the FEC's attempt to narrow them cannot save them from invalidation. The statute declares that any electioneering expenditure made "in cooperation, *consultation*, or concert" with a candidate or his agents is "coordinated" with the candidate and treated as a contribution thereto. *See* BCRA § 214(a); FECA § 315(a)(7)(B)(i); 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). Under two common definitions, to "consult" means to "discuss" or "refer to esp. [sic] for information." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 490 (1993); cf. Fund for Animals, Inc. v. Thomas, 127 F.3d 80, 84 (D.C. Cir. 1997) (in Endangered Species Act context, "consultation . . . includes all discussions, correspondence, etc." (quoting 50 C.F.R. § 402.13(a))). The FEC's safe-harbor provision appears to contravene the plain language of sections 202 and 214, which need not be stretched in the slightest in order to reach an electioneering communication that a corporation, union or individual merely "discuss[es]" with (through "inquiries" of and "responses" from) a candidate like Smith. Thus, the corporation wishing to "consult[ ]" with Smith "about legislative or policy issues" cannot be sure that the safe-harbor provision will provide any shelter at all against the statute, given the rule's variance from the statute's text. The corporation is on the horns of a dilemma. It can choose to (1) "consult[ ]" with Smith and hope the safe harbor rule is eventually upheld on Administrative Procedure Act (APA) review;[158] (2) forgo the consultation and risk the ad's inaccuracy; or (3) forgo the communication itself in an act of self-censorship.

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[158] As the Chamber of Commerce points out, "ordinary APA review [is] a process that can take years [and it would] thus defeat[ ] BCRA's mandate that constitutional issues presented by the statute be resolved in a special . . . expedited proceeding." Chamber of Commerce Br. at 13-14 n.7.



In their briefs—filed before the FEC's final rule was promulgated—the plaintiffs focus primarily on section 214's declaration that the FEC "shall not require agreement or formal collaboration to establish coordination" between a candidate (or political party committee) and an entity or individual making a disbursement. *See* BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note. They claim, essentially, that any rule promulgated pursuant to that mandate will inevitably violate the Constitution. *See, e.g.*, Chamber of Commerce Br. at 6-14. The defendants respond that (1) the assertion that "unconstitutional rules are inevitable" is faulty because the Constitution does not require agreement or formal collaboration, Intervenors Br. at 140-42; and (2) the plaintiffs' coordination challenges are nonjusticiable in any event, *see* Gov't Br. at 183- 85. The defendants are mistaken on both counts.

*First*, the Supreme Court has never suggested that the Congress can define "coordinat[ion]" so broadly that it can occur absent at least *some* type of agreement. Quite the contrary, the Court has made clear that the government's "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Colorado Republican I*, 518 U.S. at 621-22 (plurality opinion). Although the Court has recognized that "general . . . understanding[s]" and "wink or nod" arrangements may be regulated, *see Colorado Republican II*, 533 U.S. at 442; *Colorado Republican I*, 518 U.S. at 614 (plurality opinion), these are themselves "agreements." I therefore reject the notion that section 214's directive—and the FEC's final rule, *see supra* Finding 57 at pages 129-32; *see also supra* note 45—requiring no "agreement or formal collaboration" to establish coordination "is materially more narrow than the 'general understanding' and 'wink or nod' approaches recognized in the *Colorado* decisions." Intervenors Br. at 142 n.521. Read in conjunction with the statute's equating of "coordinat[ion]" with "consultation," the regulation will

inevitably deter contact between independent spenders and their elected representatives, a result "patently offensive to the First Amendment." *Clifton*, 114 F.3d at 1314 (FEC regulation limiting organization's oral contact with candidate unconstitutional because it "tread[ed] heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives").

*Second*, sections 202 and 214 are impermissibly overbroad without reference to any regulation that eventually takes hold. The provisions explicitly and *unambiguously* equate "consultation" and "coordinat[ion]."[159] I agree with the district court's statement in *Christian Coalition* that a "spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some *consultations* . . . with a federal candidate." *Christian Coalition*, 52 F. Supp. 2d at 91 (emphasis added); *see id.* (only "*considerable* coordination will convert an expressive expenditure into a contribution" (emphasis added)). I am constrained to conclude, therefore, that sections 202 and 214 will violate the First Amendment no matter what the Commission does, for no regulation it promulgates may depart (as

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[159] While section 202 does not itself use the word "consultation," it incorporates by reference section 214's overbroad definition of "coordinat[ion]":

> [I]f . . . any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of [FECA] section 304(f)(3)) [and] such disbursement is *coordinated* with a candidate or an authorized committee of such candidate, a Federal [sic], State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee[,] such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party. . . .

BCRA § 202(2); FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C) (emphasis added).



the safe- harbor rule does) from the provisions' plain text. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the . . . agency . . . must give effect to the unambiguously expressed intent of Congress."). Were sections 202 and 214 "readily susceptible" of a saving construction, *Am. Booksellers*, 484 U.S. at 397, we could simply read the word "consultation" out of the statute or give it a meaning narrower than "discuss" or "refer to . . . for information." But the Congress clearly intended the broader interpretation—why else would it have directed the FEC to repeal its current rules and promulgate regulations that do not require agreement or formal collaboration? *See* BCRA § 214(c); FECA § 315 note; 2 U.S.C. § 441a note; *see also* 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[T]he [former] FEC regulation [was] far too narrow to be effective in defining coordination in the real world of campaigns . . . ."). As the ACLU demonstrates, this inclusion of spender-candidate "consultation[s]" will undoubtedly have perverse and impermissible effects:

> Section 214 . . . effectively impose[s] a year round prohibition on all communications made by a corporation like the ACLU where there has been . . . "discussion" about the communication with a candidate. [Thus], the ACLU may not be able to discuss a civil liberties vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes that official's stand.

ACLU Br. at 20. And, as the Chamber of Commerce argues, the dilemma facing the plaintiffs—i.e., choosing between "consultation" with and communication about a candidate—"has bite right now because contacts with legislators or political party officials today may lead to claims that future speech is 'coordinated' and, hence, is an unlawful contribution." Chamber of Commerce Br. at 7. Accordingly,

under thefirst part of the pre-enforcement review test enunciated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the plaintiffs' challenges to sections 202 and 214 are "appropriate for judicial resolution at this time" because the outcome of any further FEC rule-making will not affect this court's merits analysis.[160] *Id.* at 149. Under the second prong of *Abbott Laboratories*, moreover, the "hardship to the parties of withholding [judicial] consideration," *id.*, would be extreme because ordinary APA review of the regulations could take several months or even years.

* * *

I would hold, therefore, that BCRA's definition of "coordinat[ion]'' is overbroad. Sections 202 and 214 subject to the Act's source-and-amount limitations disbursements for electioneering communications made merely in "consultation" with a candidate or political party. In my view, the provisions impermissibly restrict *independent* disbursements and are therefore facially invalid.

Likewise invalid, I believe, is BCRA section 213, which compels a political party committee, at the time the party's candidate is nominated, to make a binding choice between disbursing either independent or "coordinated" disbursements in support of the candidate. *See* BCRA § 213; FECA § 315(d)(4)(A); 2 U.S.C. § 441a(d)(4)(A); *see also supra* Part II.C. Under BCRA's overbroad definition of "coordina-t[ion]," section 213 is necessarily unconstitutional because it restricts political parties in exercising their First Amendment "right to make unlimited independent expenditures." *Colorado Republican I*, 518 U.S. at 618. If *any* national, state or

[160] Additionally, as the plaintiffs suggest, *see supra* note 158, piecemeal and delayed review of their constitutional claims would defeat BCRA's mandate that judicial consideration of such claims "shall be . . . expedite[d] to the greatest possible extent." BCRA § 403(a)(4).



local committee of a political party makes an expenditure in "consultation" with a candidate, BCRA brands the expenditure "coordinated" instead of independent and, for the rest of the election cycle, *every other* committee of the party—national, state and local—is prohibited from making independent disbursements "with respect to the candidate." BCRA § 213; FECA § 315(d)(4)(B); 2 U.S.C. § 441a(d)(4)(B) ("For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee."). That section 213 *compels* party committees to work together in this fashion—as though the hand of one were the hand of all—is especially perverse in light of the fact that the statute elsewhere severely *restricts* them from working together to raise certain kinds of funds and to decide how such funds should be used. *See, e.g.*, BCRA § 101(a); FECA § 323(a), (b)(2)(B)(iv); 2 U.S.C. 441i(a), (b)(2)(B)(iv); *see generally infra* Part IV.D. I believe that, in light of *Colorado Republican I*, the provision cannot stand.

### *D. Restrictions on Non-Federal Funds*

I turn now to BCRA Title I, "Reduction of Special Interest Influence," and, in particular, to section 101, which regulates "[s]oft money of political parties." BCRA § 101. In a five-part analysis, I examine in turn the provision's restrictions on (1) the national, state and local political party committees, *see* FECA §§ 301(20), 323(a), (b); (2) fundraising, *see* FECA § 323(c); (3) any political party committee's solicitation of "any funds" for, or transfer of "any funds" to, certain tax-exempt organizations, FECA § 323(d); (4) any federal candidate's solicitation or transfer of non-federal funds, *see* FECA § 323(e); and (5) any state candidate's spending of non-federal funds on certain "public communication[s],"

FECA § 323(f).[161] I would hold that new FECA section 301(20) and sections 323(a), (b) and (d) violate the First Amendment's guarantee of expressive association; sections 323(c) and (f) are inseverable from section 301(20); and section 323(e) is constitutionally sound.[162]

1. The Party Restrictions: New FECA Sections 301(20) and 323(a) and (b)

In the following subsections, I first explain at some length my reasons for concluding that BCRA's restrictions on a party committee's use of non-federal funds are subject to strict scrutiny under *Citizens Against Rent Control* and other Supreme Court First Amendment jurisprudence. I then discuss the constitutionality of new FECA section 323(a)—which forbids the national party committees to use non-federal funds in any way whatsoever—and conclude that it fails strict scrutiny. Finally, I discuss the constitutionality of FECA sections 301(20) and 323(b)—which severely diminish the ability of state and local party committees to spend non-federal funds on so-called "Federal election activity"—and conclude that they likewise fail strict review.

a. The Party Restrictions are Subject to Strict Scrutiny

The *McConnell, RNC* and *CDP* plaintiffs claim that FECA sections 301(20) and 323(a) and (b) are subject to strict scrutiny; they contend, *inter alia,* that the provisions severely burden their right to expressive association by prohibiting the political parties from pooling non-federal donations and

[161] Although I recognize that my references to FECA sections as opposed to BCRA section 101 may be distracting, I use FECA references in this Part because of BCRA section 101's regulatory complexity and its division into six separate components—new FECA sections 323(a), (b), (c), (d), (e) and (f).

[162] Accordingly, I would not reach the merits of various plaintiffs' federalism, free press or equal protection claims except with respect to section 323(e). *See infra* Part IV.D.4.



spending them on speech that does not expressly advocate the election or defeat of, and is not coordinated with, any federal candidate.[163] *See* McConnell Br. at 25-26 & n.9, 33; RNC Br. at 51-53; CDP Br. at 27-31; McConnell Opp. Br. at 17-19; RNC Opp. Br. at 35-39; CDP Opp. Br. at 14-15. I agree.

When it comes to the right of expressive association, one must start with the baseline announced in *NAACP v. Alabama:* "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama,* 357 U.S. at 460-61. Seeking to justify a departure from this standard, the defendants argue that sections 323(a) and (b) are straightforward contribution limits akin to the ones the Supreme Court sustained in *Buckley* and, as such, need only be "closely drawn" to further a "sufficiently important interest." Intervenors Br. at 51 (quotations omitted); *see id.* at 14-16; Intervenors Opp. Br. at

[163] Relying on *California Democratic Party v. Jones*, 530 U.S. 567 (2000), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the plaintiffs argue as well that sections 301(20) and 323(a) and (b) are subject to strict review because they irretrievably "splinter[] the various elements of the political party apparatus" and thereby burden the political parties' associational rights. RNC Br. at 37 (capitalization altered); see, e.g., id. at 37-44; McConnell Br. at 28, 31-32 (restrictions "work[] an unprecedented intrusion into the ability of political party committees to coordinate strategy on a nationwide basis, and to associate among each other and with their principal officeholders and candidates"); CDP Br. at 35; RNC Opp. Br. at 22-24; McConnell Opp. Br. at 15-17. And relying on *United States v. Kokinda*, 497 U.S. 720 (1990), *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Bates v. State Bar*, 433 U.S. 350 (1977), they urge the court to apply strict scrutiny to the extent that sections 301(20) and 323(a) and (b) prohibit political parties and their agents from soliciting campaign funds. See, e.g., RNC Br. at 46-49; McConnell Br. at 26-27; CDP Br. at 40; RNC Opp. Br. at 34-35; CDP Opp. Br. at 21-22; RNC Reply Br. at 17-18. In light of the discussion infra, I would not reach the merits of these claims.

17-23; Gov't Opp. Br. at 3-4. More specifically, they claim that *Buckley's* decision to uphold FECA's $25,000 ceiling on aggregate contributions to committees and candidates was "premised on the Court's understanding that virtually *all* donations of value to a national political party were 'contributions' within the meaning of FECA." Gov't Br. at 64 (emphasis in original); *see* Intervenors Opp. Br. at 18. Rending from context a snippet of a footnote, the government suggests the Court held that all "'[f]unds provided to a candidate *or political party* or campaign committee either directly or indirectly . . . constitute a contribution.'" Gov't Br. at 64 n.57 (quoting *Buckley*, 424 U.S. at 23 n.24) (emphasis the government's). But *Buckley* held no such thing. The footnote upon which the government relies states (with the omission included) that, under the Act, "[f]unds provided to a candidate or political party or campaign committee either directly[,] or indirectly *through an intermediary*[,] constitute a contribution." *Buckley*, 424 U.S. at 23-24 n.24 (emphasis added). Thus, as the *McConnell* plaintiffs contend, the footnote

> stands only for the proposition that funds that would *otherwise* constitute a contribution still constitute a contribution if provided through an indirect *source*—not that [non-federal] funds constitute a contribution. Indeed, if the Court had interpreted the FECA definition of "contribution[ ]" in the manner defendants suggest, the FEC allocation regulations, treating [non-federal] funds as a discrete category from federally regulated "contributions," would have been flatly inconsistent with the language of the statute.

McConnell Opp. Br. at 19 (first emphasis added). The Act defines a "contribution" as a donation made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). But non-federal donations to political parties are *not* made for that purpose; they are made instead to pay



for grassroots campaign materials, voter registration efforts, get-out-the-vote drives and issue advocacy, much of which is directed toward elections for *state* office. *See Jacobus v. Alaska*, 182 F. Supp. 2d 881, 888 n.8 (D. Alaska 2001) ("'Soft money' describes [donations] to political parties (as opposed to candidates) that solely support party-building activities, such as: voter registration, 'get out the vote' drives, issue advocacy, and the purchase of campaign items such as slate cards, bumper stickers, and yard signs." (citation omitted)). That is precisely why such funds are called *non-federal* funds. *See* TWENTY YEAR REPORT, *supra*, at ch.3 (FEC recognizing "Constitution grants each [S]tate the right to . . . establish its own rules for financing the nonfederal elections held within its borders" and therefore funds used "in connection with" state, and not federal, elections are not subject to federal regulation); *see also supra* note 30 and accompanying text. If the Court had adopted the "contribution" definition the defendants say that it did, *see* Gov't Br. at 64, there would have been no need for the Congress's hard-fought effort to enact BCRA; proponents of tighter restrictions simply could have brought suit under the APA to overturn the FEC's allocation regulations. *See* 5 U.S.C. § 706(2)(A) (reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Next, the defendants claim that the Supreme Court's *Cal-Med* judgment reduces our review to less-than-strict scrutiny. *See* Gov't Br. at 65-66; Intervenors Opp. Br. at 18-19. I recognize that their position finds some support in the plurality of *Cal-Med*, which involved a challenge to FECA's limits on contributions to non-party, multi-candidate committees. The plurality reasoned that

> [i]f the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute

> to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee . . . which advocates the views and candidacies of a number of candidates.

*Cal-Med*, 453 U.S. at 197 (plurality opinion). Although the defendants acknowledge that Justice Blackmun (the fifth member of the majority) did not concur in the above analysis, *see* Gov't Br. at 66, they downplay the significance of his separate opinion. Unlike the plurality, which limited its discussion to conduit committees established for the purpose of passing contributions to candidates, Justice Blackmun suggested that "a different result would follow if [FECA] were applied to contributions to a political committee established for the purpose of making *independent expenditures*, rather than contributions to candidates." *See Cal-Med*, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in judgment) (emphasis added).

In any event, whatever confusion may have existed after *Cal-Med* regarding the applicable standard of review was resolved less than six months later when a majority of the Court held that *Buckley* and *Cal-Med* carved out only "a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*." *Citizens Against Rent Control*, 454 U.S. at 296-97 (emphasis in original); *see supra* Part III.C. In a footnote, the intervenors dismiss *Citizens Against Rent Control* as "inapposite" to the actions at bar because "the recipient committee had been formed to support a local ballot measure . . . rather than to advocate the election or defeat of candidates for public office" and because "the Court found [that] there was no risk of actual or apparent corruption" in that setting. Intervenors Opp. Br. at 20 n.49. But



the fact that political party committees are not formed for the sole purpose of supporting ballot measures does not determine our standard of review. *Buckley* itself would suggest that, if anything, the constitutional necessity of protecting associational speech is *more* acute in the candidate context than in the ballot measure context; because "the ability of the citizenry to make informed choices among candidates for office is essential, . . . it can hardly be doubted that the constitutional guarantee [of associational speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 14-15 (quotation omitted). And although I recognize the risk of *quid pro quo* corruption in the candidate context—a risk absent in the ballot measure context, *see Bellotti*, 435 U.S. at 790—the governmental interest in preventing corruption enters the constitutional equation only *after* one has decided upon the appropriate standard of review.

Returning to the strict-scrutiny baseline of *NAACP v. Alabama*, I acknowledge that the simple grouping of individuals or entities is not protected for its *own* sake:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association *for the advancement of beliefs and ideas* is an inseparable aspect of . . . freedom of speech.

*NAACP v. Alabama*, 357 U.S. at 460 (citations omitted) (emphasis added). In other words, not all associations are created equal under the First Amendment; only those groups that are organized to engage in protected speech are guaranteed full constitutional shelter. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("To determine whether a group is protected by the First Amendment's expressive

associational right, we must determine whether the group engagesin 'expressive association.'"); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (to recognize right of expressive association "is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution"). Put specifically in campaign finance terms, *see Beaumont*, 278 F.3d at 267 ("[L]anguage from non-funding decisions does not suddenly become inoperative when contributions and independent expenditures are at issue." (citing, *inter alia*, *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Mills*, 384 U.S. at 218; *New York Times Co.*, 376 U.S. at 270; *NAACP v. Alabama*, 357 U.S. at 460)), this straightforward observation explains the differing levels of scrutiny in *Buckley*, which dealt with contribution-to-candidate limits, and *Citizens Against Rent Control*, which involved a donation-to-committee limit. While the association between donor and candidate produces a type of expression—i.e., it lets the rest of the world know that the donor is behind the candidate and presumably supports what he stands for—the First Amendment *value* of the association is not particularly significant because, most often, the purpose of the association is the election of the candidate and not "the advancement of beliefs and ideas." *NAACP v. Alabama*, 357 U.S. at 460; *see* Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 23 (under *Buckley*, contribution to candidate "is an expression of solidarity with the candidate and little more"). It logically follows, and *Buckley* holds, that restrictions on contributions to candidates receive heightened scrutiny but not full protection. *See Shrink Missouri*, 528 U.S. at 387-88 ("under *Buckley's* standard of scrutiny," contribution-to-candidate limit survives review if "[g]overnment demonstrate[s] that [the] regulation [is] 'closely drawn' to match a 'sufficiently important interest'" (quoting *Buckley*, 424 U.S. at 25)).



In contrast, "[c]ontributions by individuals . . . to political committees . . . permit the pooling of resources. This amplifies the contributors' individual voices." Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1064 (1985) (hereinafter BeVier, *Money and Politics*). And unlike restricting the "undifferentiated, symbolic act of contributing" to a candidate, *Buckley*, 424 U.S. at 21, restricting donations to a political party "automatically affects" the amount of protected expression in which the party may then engage on behalf of its adherents, *Citizens Against Rent Control*, 454 U.S. at 299. Here I return to first principles. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Therefore, political parties that make independent expenditures—to engage in issue advocacy referring to candidates, to support ballot measures or to fund voter registration and get-out-the-vote activities—provide a service essential to our representative democracy by accepting donations for the sake of amplifying and channeling the political speech of other organizations and individual citizens. *See Citizens Against Rent Control*, 454 U.S. at 294 ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."); *Kusper*, 414 U.S. at 57 ("The rightto associate with the political party of one's choice is an integral part of this basic constitutional freedom."); *see also Colorado Republican I*, 518 U.S. at 618 (plurality opinion) ("[P]ooling resources from many . . . contributors is a legitimate function and an integral part of party politics." (quoting S. REP. NO. 93-689, at 7 (1974))); *id.* at 629 (Kennedy, J., concurring in judgment and dissenting in part) ("[p]olitical parties have a unique role in serving" principle that "debate on public issues should be

uninhibited, robust, and wide-open" because "they exist to advance their members' shared political beliefs" (quotation omitted)). As the Court explained in *NCPAC:*

> the 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [an] organization[ ] and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

*NCPAC*, 470 U.S. at 495; *see* THE FEDERALIST NO.35, at 214 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contributors "are aware that however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by [another] than by themselves"). Thus does the collective input of donor-participants—and, in turn, the output of recipient political parties—assist fellow voters in "mak[ing] informed choices among candidates for office," i.e., the individuals who "will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15; *see United States v. CIO*, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in judgment) ("There is . . . an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate . . . of the advantage of free and full discussion[.]"); 4 ELLIOT'S DEBATES, *supra*, at 575 (speech of James Madison) ("value and efficacy" of right to vote "depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively"); *see generally*



ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF- GOVERNMENT (1948) (free speech necessary for informed electorate).

As Alexis de Tocqueville cautioned long ago, the courts have special reason in the issue advocacy context to scrutinize strictly any governmental interference with any step of the process:

> If once the [state] has a general right of authorizing associations of all kinds upon certain conditions, [it] would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by [it].

ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 312 (Phillips Bradley ed., 1990) (1840). That is, a reviewing court should be especially wary of any restriction that might stifle issue-driven evaluation (and sometimes criticism) of the law's enactors by preventing a party's pooling of resources collected, at least in part, for that very activity. *See Eu*, 489 U.S. at 223-24 ("A 'highly paternalistic approach' limiting what people may hear is generally suspect, . . . but it is particularly egregious where the State censors the political speech a political party shares with its members." (citations omitted)); *see also Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring) (no deference to legislature warranted "where that deference . . . risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"); HARRY KALVEN, JR., A WORTHY TRADITION 63 (1988) ("[P]olitical freedom ends when government can use its powers and its courts to silence its critics."); JOHN HART ELY, DEMOCRACY AND DISTRUST 106 (1980) ("Courts must police inhibitions on [protected] political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.").

In sum, *Citizens Against Rent Control* requires no less than strict scrutiny of limits on non-federal donations to political party committees and neither *Buckley* nor *Cal-Med* holds to the contrary. *See Citizens Against Rent Control*, 454 U.S. at 294, 296-98; *Lincoln Club v. City of Irvine*, 292 F.3d 934, 936-39 (9th Cir. 2002) (applying strict scrutiny to ordinance imposing limit on amount of donations person or committee may receive from single source during election campaign); *see also Colorado Republican I*, 518 U.S. at 627-28 (Kennedy, J., concurring in judgment and dissenting in part) ("[W]e cannot allow the Government's suggested labels to control our First Amendment analysis. . . . We had no occasion in *Buckley* to consider possible First Amendment objections to limitations on . . . parties."); *see generally* John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 CATH. U.L. REV. 13 (2000). By banning the national political party committees from receiving or spending any non-federal funds whatsoever, section 323(a) operates as a restriction on those who would donate non-federal funds to the parties for the sake of participating in collective, protected issue advocacy *via* a party's independent expenditures. And to the extent that section 323(b) prohibits state, district and local party committees from spending non-federal funds on "Federal election activity" such as

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (*regardless of whether the communication expressly advocates a vote for or against a candidate*),

BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (emphasis added), it operates to restrict collective speech in much the same manner as the national



party ban. BCRA § 101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). By arguing that section 323(b) is not subject to strict scrutiny because it "simply requires that the money used to fund 'Federal election activity' [as defined by section 301(20)] be raised in compliance with the longstanding federal contribution restrictions," Gov't Opp. Br. at 3, the defendants merely beg the First Amendment issue before us—whether and to what extent the Congress may limit donations *not* made "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i), *not* expended on advocating the election or defeat of a federal candidate and *not* coordinated with the candidate. In my view, sections 301(20) and 323(a) and (b)—which plainly restrict such donations—survive First Amendment review only if they serve, in a narrowly tailored fashion, the government's compelling interest in preventing actual or apparent corruption of federal candidates and officeholders.

b. Section 323(a) Fails Strict Scrutiny

Having decided the applicable standard of review, I conclude in the following sections that (1) the national party ban does not serve the government's interest in preventing actual or apparent corruption; and (2) even if the ban did alleviate corruption, it would sweep too broadly to be sustained in any event.

(1)

The defendants refer us to a mountain of discovery—mostly anecdotal in nature—gathered to support the Congress's judgment that "soft money has been used to evade the law and, in actuality and appearance, corrupts the political process." Intervenors Br. at 20 (capitalization altered); *see, e.g., id.* at 6- 12, 20-50; Gov't Br. at 22-36, 68-86. I note at the outset, however, that they have identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party

committees. *See supra* Finding 80a at pages 180-81; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (conceding lack of evidence that any United States Senator or Representative "changed his or her vote on any legislation in exchange for a donation of non-federal money to that [person's] political party"); McCain Dep. at 170-71 (same); Feingold Dep. at 132 (same); Snowe Dep. at 206-07 (same); Jeffords Dep. at 107 (same); *see also, e.g.*, 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution."); *cf.* McConnell Aff. at 8 ("During my 18 years in the United States Senate, I have never witnessed any colleague who changed his vote or took any official action as a result of either a federal contribution or a nonfederal donation to a political party at the national, state or local level."). Nor have they supported with credible evidence their contention that "party committees provide soft money donors with special access to officeholders." FEC's Am. Proposed Findings of Fact at 24 (capitalization altered); *see supra* Findings 80c, 81 at pages 182-89; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence that "officeholders are more likely to meet with donors of non-federal money than with donors of federal money"); Cross Exam. of Def. Witness Fowler at 45 (same). Although the defendants point to certain notorious incidents they believe underscore the corrupting effect of non-federal funds, *see, e.g.*, Intervenors Br. at 11 & n.33 (noting Enron "gave over $400,000 to each political party" but not asserting funds affected any federal official's decision-making); *id.* at 29 (noting Roger Tamraz "made enormous soft money contributions" to DNC and was granted six meetings with President Clinton to obtain backing for pipeline project but "never received the backing he sought"), they have not identified any empirical link between large non-federal contributions and legislative voting behavior. *See supra*



Finding 80b at pages 181-82; *see also, e.g.*, Cross Exam. of Def. Expert Green at 58 ("Q: . . . What statistical work are you aware of that you think is statistically valid since 1990 that correlates contributions . . . to roll call votes? A: None."). Given the Supreme Court's working definition of corruption—i.e., "a subversion of the political process" that occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain," *NCPAC*, 470 U.S. at 497—I would need to see far more powerful evidence to accept the defendants' claim that non-federal donations corrupt or appear to corrupt federal candidates.

Likewise, the defendants have not established a convincing correlation between the "explosion" of non-federal funds on the one hand and an intensified public sense—i.e., appearance—of corruption on the other. *See supra* Finding 82 at pages 189-93; *see also, e.g., The Constitution and Campaign Reform: Hearings on S.522 Before the Comm. on Rules and Admin.*, 106th Cong. (2000) (sharpest decline in voter turnout, from 60.84 per cent to 50.11 per cent, occurred between 1968 and 1988, when non-federal funds were mostly *absent* from party fundraising). Nor have they persuasively rebutted evidence indicating that, to the extent the voting public *does* perceive corruption, that perception has been fueled not only by non-federal donations but also by lobbying efforts, *see supra* Finding 81 c.3 at page 187, federal contributions, *see supra* Finding 82b.2 at page 192, and the mass media's "populist demonologies" of politics in general, Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1356 (1994). *See* Primo Rebuttal Report at 11-25; *see generally* Ayres Rebuttal Report.

Turning to the defendants' broader assertions of massive national party "soft money" laundering, *see, e.g.*, Gov't Br. at 70 ("[S]oft money has become the conduit through which

wealthy individuals, labor unions and corporations have in many ways seized control of our political process." (quoting 147 CONG. REC. S2449 (daily ed. Mar. 19, 2001) (statement of Sen. Collins))); Intervenors Br. at 35 (arguing that national, state and local political parties serve as "offshore banks, whose principal activity [is] to shuttle money back and forth . . . to pay for expensive mass media campaigns orchestrated by the national parties" in aid of federal candidates (quotation omitted)), I find that they are largely discounted by the Supreme Court's decision in *Colorado Republican I*. Acknowledging that "FECA permits individuals to contribute more money . . . to a party than to a candidate" and that it also allows "unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and 'get out the vote' drives, see § 431(8)(B)(xii)," the plurality in *Colorado Republican I* observed nonetheless that

> *the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated.* Unregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. See § 431(8)(B).

*Colorado Republican I*, 518 U.S. at 616 (plurality opinion) (emphasis added); *see id.* at 647 (Thomas, J., concurring in judgment and dissenting in part) ("[T]here is little risk that an individual donor could use a party as a conduit for bribing candidates."). Although a majority of the Court in *Colorado Republican I* dismissed the defendants' parties-as-conduits theory, neither the intervenors nor the government discusses the case at any length. The government mentions the decision but once in its opposition discussion of Title I. *See* Gov't Opp. Br. at 4 n.2 (citing decision for ironic proposition that "the government interests supporting BCRA are plainly compelling"). The intervenors treat the case primarily in



footnotes, once to note that the Justices used the term "softmoney" instead of "non-federal funds," *see* Intervenors Opp. Br. at 5 n.14; twice to suggest that the plurality's observations were dicta based on an inadequate evidentiary record,[164] *see id.* at 28 n.73; *see also* Intervenors Reply Br. at 38 n.114; and once to point out that the "plurality stated that it could understand how Congress, were it to conclude that the potential for evasion of individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties," Intervenors Opp. Br. at 50 n.146 (quoting *Colorado Republican I*, 518 U.S. at 617 (plurality opinion)). While the intervenors assert that "precisely what Congress did" in enacting the national party ban was change the contribution-to-party limit, *id.*, they neglect the key distinction between federal and non-federal funds. The plurality in *Colorado Republican I* did state that it "could understand how Congress . . . might decide to change the statute's limitations on *contributions* to political parties," *Colorado Republican I*, 518 U.S. at 617 (plurality opinion) (emphasis added), but it was not speaking—as the intervenors are—in terms of *non-federal* donations to parties. Indeed, it had just explained that such donations present only an "attenuated" danger of corruption. *Id.* at 616-17 (plurality opinion). Instead, the plurality was speaking in terms of *federal* "contributions," i.e., donations that are made "for the purpose of influencing an[ ] election for Federal office,"

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[164] I do not disagree that the plurality's statement about the attenuated influence of non-federal funds was *obiter dictum*. I am mindful, however, that while "the Court sometimes changes its tune when it confronts a subject directly," we would be prudent as an inferior court to "take its assurances seriously" and to "respect what the majority says rather than read between the lines." *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) ("If the Justices are pulling our leg, let them say so."), *cert. denied*, 508 U.S. 950 (1993).

2 U.S.C. § 431(8)(A)(i), and that might therefore have a corrupting effect on federal candidates. *See Colorado Republican I*, 518 U.S. at 616-17 (plurality opinion).

Even were I to infer from the record that the use of non-federal funds has to some extent promoted actual or apparent corruption of federal candidates—and I do not, *see supra* Findings 80-82 at pages 180-93—the defendants have offered only scant and contradictory support for the proposition that the national party ban "will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664. Although the statute aims explicitly at the "reduction of special interest influence," much evidence in the record indicates that the ban will in fact *magnify* that influence.

*First*, while prohibiting national political party committees from raising or spending non-federal funds for issue advocacy—whenever the advocacy occurs, whether or not it refers to a federal candidate and whether or not it is broadcast—BCRA continues to permit other groups to raise and spend non-federal funds at any time for non-broadcast, candidate-focused issue advertising. To the extent that *any* candidate-focused issue ad is corrupting—as the defendants would have us believe—single-issue ads sponsored by interest groups are no less likely (and perhaps more likely) to buy political influence than are more broad-based party-sponsored ads. *See Colorado Republican I*, 518 U.S. at 617 (plurality opinion) ("If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor."); La Raja Expert Report at 19-20, 46 (because interest groups "are not linked at the ballot box with the candidate," they "can air ads without facing reprisals from voters, an arrangement that undermines accountability in the campaign process"); Milkis Expert Report at 25 (interest groups "push government to enact



policies that benefit small constituencies at the expense of the general public"); *RNC v.FEC*, Civ. No. 98-CV-1207 (Hermson Dep. at 208-09 (parties' use of non-federal funds "does not create such strong policy-oriented IOU's between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates")); *see also* Keller Expert Report at 27 (political parties have historically countered undue influence of groups with narrow agendas by mediating political processes and "bend[ing] public policy toward a larger, national influence"); Issacharoff & Karlan, *supra*, at 1714 ("groups that engage in independent advocacy have strong incentives to stress one issue around which to mobilize supporters and contributors as opposed to the range of programmatic positions" that candidates and political parties must take); *The Supreme Court, 1995 Term—Leading Cases: Political Party Expenditures*, 110 HARV. L. REV. 236, 242-43 (1996) ("In a country of diverse views and competing interests, political parties . . . enable[ ] the electorate to transcend the parochial interests of PACs and voluntary associations, which are usually united by self-interest, narrow ideologies, or particular issues."); *compare supra* Finding 70 at pages 145-47 (political parties exert moderating influence on public policy), *with supra* Finding 79 at pages 176-80 (interest groups arrange discrete and temporary alliances to address narrow issues and their political activities "are far less transparent than those of parties" (quoting Keller Expert Report at 22)).

*Second*, both the record and common sense suggest that if BCRA section 101 passes constitutional muster, the supply of non-federal funds currently flowing to the political parties will be channeled to interest groups. *See supra* Finding 79d at pages 178-80; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 7 (admitting "[d]efendants have no evidence establishing that current donors of nonfederal money to national political party committees will, after the

effective date of BCRA, cease donating or spending non-federal money in ways that might influence federal elections"); Gallagher Decl. at 16 (expecting increased contributions to NARAL after BCRA); La Raja Expert Report at 40 ("Interest groups will take advantage of the vacuum left by the national committees to raise the nonfederal funds that parties have raised in the past."); Lux Dep. at 51 (agreeing with "widely discussed" prediction of increased non-federal donations to interest groups); Cross Exam. of Def. Witness Bok at 61 (same); Issacharoff & Karlan, *supra*, at 1713 (observing that speakers "spend money on politics because they care about political outcomes" and that "[t]he money reform squeezes out of the formal campaign process must go somewhere"); *cf. SEC v. Int'l Loan Network, Inc.*, 968 F.2d 1304, 1305 (D.C. Cir. 1992) ("Money is always there but the pockets change." (quoting Gertrude Stein)).

*Third*, the record indicates as well that non-federal funds made available to interest groups will be used for a wide range of election-related activities, including grassroots and get-out-the-vote activities, voter registration and fundraising events with federal officeholders. *See supra* Finding 79c at pages 177-78; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 18-19; Cross Exam. of Def. Expert Green at 15-24; Cross Exam of Def. Expert Mann at 164-65; Milkis Rebuttal Report at 11; Gallagher Decl. at 6 (NARAL uses federal officeholders to raise funds); Rosenberg Aff. at 3 (New Democrat Network uses federal office holders to raise funds); Sease Decl. at 5 (Sierra Club uses federal officeholders to raise funds); Solmonese Aff. at 5 (EMILY's List uses federal officeholders to raise funds). To the extent that any one or any combination of these activities is corrupting when sponsored by the national party committees—although, in light of *Colorado Republican I*, 518 U.S. at 616-17 (plurality opinion), I do not presume that they are—they are no less corrupting when sponsored by interest



groups. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 19-20; Cross Exam of Def. Expert Mann at 148-49.

I do not suggest that the record, as a whole, supports the proposition that BCRA *encourages* corruption. In light of the strict scrutiny applicable here, however, the record *does* "diminish the credibility of the government's rationale for restricting [non-federal funds] in the first place." *City of Ladue*, 512 U.S. at 52. Just last Term the Court reminded us that a speech restriction "cannot be regarded as protecting an interest of the highest order"—and will therefore fail strict scrutiny—if "it leaves appreciable damage to that supposedly vital interest unprohibited." *White*, 122 S. Ct. at 2537 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment)). Indeed, the evidence I have just described leads me to conclude that "the interest given in justification of [section 323(a)] is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (speech restriction will be struck if it "provides only ineffective or remote support for [its] asserted goals" (quotations omitted)), *cert. denied*, 517 U.S. 1119 (1996); Cross Exam of Def. Expert Sorauf at 191 ("it's speculative" whether "banning soft money will . . . restore public confidence").

(2)

Even were I convinced that new FECA section 323(a) materially served to prevent actual or apparent corruption, I am not persuaded that it would do so narrowly enough to comport with the First Amendment's guarantees. Surprisingly, the defendants engage in only a half-hearted attempt to convince the court otherwise.[165] *See* Gov't Br. at 86-87;

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[165] Arguing that strict scrutiny is inapplicable, the defendants make *no* attempt to establish that section 323(a) is narrowly tailored. While they do

Intervenors Br. at 55-57; Gov't Opp. Br. at 44-46; Intervenors Opp. Br. at 24-27; Gov't Reply Br. at 35-36; Intervenors Reply Br. at 25-29. Boiled down to its essence, their tailoring argument rests on a single, flawed premise—namely, that under the Supreme Court's jurisprudence, we owe substantial deference to the Congress's conclusion that "anything less" than BCRA's broad prophylactic ban on the national party committees' use of non-federal funds "would not adequately reduce the appearance and reality of corruption." Gov't Opp. Br. at 44; *see* Intervenors Br. at 55-57. This hardly seems like a tailoring argument at all, *see NAACP v. Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect."), and, in any case, I would reject it.

The defendants believe that *Colorado Republican II* supports the ban on grounds of "loophole closing" or "evasion prevention." Gov't Br. at 60-61, 71-72; *see* Intervenors Br. at 53-55; Intervenors Opp. Br. at 24-27. The Court in *Colorado Republican II* sustained against a facial attack FECA's party expenditure provision, 2 U.S.C. § 441a(d), because "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Colorado Republican II*, 533 U.S. at 465. Perceiving "no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," the Court found "good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly *that kind* of spending." *Id.* at 464 (emphasis added). Quoting selectively from the decision, the defendants parrot the Court's concern that, "whether they like it or not," political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders" because donors

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contend that the ban is "closely drawn to achieve its objectives," *e.g.*, Gov't Br. at 86, they collectively spend fewer than 20 pages (out of 800) in briefing that claim.



"give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 452, 458. The Court's observation, however, related only to the danger of corruption presented by *coordinated* expenditures. *See id.* at 449-60. While upholding the party expenditure provision because it targets precisely *that* danger, *see id.* at 452, 464, the Court was careful to limit its "anticircumventional" rationale to party spending that functions like a direct donor-to-candidate contribution. *See id.* at 464; *see also* McConnell Opp. Br. at 23 ("To the extent that the Court has recognized an anti-circumvention rationale, . . . it has only used it to justify limits on contributions that can be used for all of the same purposes as direct contributions to federal candidates themselves."). The Court was also careful to distinguish *Colorado Republican I*, which held that a party's *independent* expenditures present little or no danger of "corruption-by- conduit." *Colorado Republican II*, 533 U.S. at 463-64. Thus, the Court advised, its decision did nothing to upset a party's "right under *Colorado I* to spend money in support of a candidate without legal limit so long as it spends independently." *Id.* at 455. Indeed, the Court emphasized that "[a] party may spend independently *every cent it can raise* wherever it thinks its candidate will shine, on every subject and any viewpoint." *Id.* (emphasis added). But that is precisely what the ban on national party non-federal funds intends to prevent. The defendants' response that a party may spend independently every cent it can raise *subject to federal limits* is insufficient. *See* Gov't Br. at 63 (BCRA requires "merely" that independent party expenditures "be financed by funds that are subject to the 'contribution' limits of FECA"). While the ban will slow if not stop coordinated activity, it also "automatically affects" a national party's ability to engage in issue advocacy and party-building activities independent of any candidate's campaign. *Citizens Against Rent Control*, 454 U.S. at 299. Thus does the ban impermissibly fail to distinguish between fully-protected and less protected asso-

ciational activity. *See Colorado Republican I*, 518 U.S. at 617 (plurality opinion) ("the constitutionally significant fact" in donation-to-party context "is the lack of coordination between the candidate and the source of the expenditure"); RNC Opp. Br. at 38 ("fundamental error" underlying ban "is the assumption that *all* funds received by the party can be subjected to a federal contribution limit just because *some* of the party's activities are regulable" (emphasis in original)); *see also Free Speech Coalition*, 122 S. Ct. at 1404 (notion that "protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down").

I note finally that the defendants, like BCRA's sponsors, have suggested that it is primarily the *size* and *source* of certain non-federal donations that corrupts or appears to corrupt federal candidates. *See, e.g.*, Gov't Br. at 68 (emphasizing top 50 donors of non-federal funds in 1996 election cycle gave more than $500,000 each); Gov't Opp. Br. at 16 (emphasizing "common sense proposition that the problem of corruption and perceived corruption grows with the size of the contributions at issue"); Feingold Dep. at 123 ("I have been very clear that I consider the soft money contributions to be extremely corrupting because of their size."); *see also supra* Findings 65-66 at pages 139-40. The government points out that in the 2000 election cycle, "[a] pproximately 60 percent of the parties' total soft money receipts were donated by approximately 800 entities, with more than 400 of those corporations and unions." Gov't Br. at 68 (citing Mann Expert Report at 24-25). Coupling that statistic with the sensible proposition that "[t]he diversity of [similar sized] financial contributions to parties is itself a check on the influence of special interests," Keller Expert Report at 29, one would think a *cap* on the amount of non-federal donations from any single source would serve to root out the most corrupting influences while attempting to honor the First Amendment at the same time. The Congress rejected such a



proposal, *see* 147 CONG. REC. S2908 (daily ed. Mar. 26, 2001) (Hagel amendment proposing aggregate cap of $60,000), and the defendants—returning to their "deference axiom," Intervenors Br. at 56—confidently assure us that we may not "second-guess" that judgment:

> In determining whether campaign finance regulations are closely drawn, the Supreme Court has consistently refused to second-guess Congress either as to the need for prophylactic measures or the particularities of those measures. Thus, in responding to the claim that a $1,000 contribution limit was "unrealistically low," the *Buckley* Court held that it would neither second- guess Congress's "failure to engage in such fine tuning" nor use a "scalpel" to scrutinize Congress's judgment about the appropriate limit. *Buckley*, 424 U.S. at 30. . . . This principle of deference to Congress's expert judgment has since *Buckley* become firmly embedded in the Supreme Court's jurisprudence.

Intervenors Opp. Br. at 24. I disagree. Strict scrutiny *mandates* that we second-guess the Congress's means-ends judgment where the means chosen restrict at least some degree of protected speech. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *see also MCFL*, 479 U.S. at 265 (courts must be "vigilant against [even] the modest diminution of speech" and ensure the Congress "curtail[s] speech only to the degree necessary to meet the particular problem at hand"); BeVier, *Money and Politics, supra*, at 1084-85 (Court's strict scrutiny jurisprudence cautions "reluctance to yield passively to legislative determinations of 'the need for prophylactic measures'" and requires courts "to assure in every case that the legislatively chosen means bear a relation of imminence and likelihood to the harm sought to be prevented"); BeVier, *Political Speech, supra*, at 314 (while

"Court's general doctrine allows legislatures a relatively free choice of means," Congress's choice of means is greatly limited in cases where "strict review" is applicable (citing *NAACP v. Button*, 371 U.S. 415; *Shelton v. Tucker*, 364 U.S. 479 (1960))). For reasons I have explained in detail, *see supra* Part IV.D.1.a, whatever "principle of deference" *Buckley* announced in the contribution-to-candidate context is inapposite here. The Congress fashioned a broad prophylactic ban on non-federal donations to any national political party committee in *any* amount from *any* entity or individual, irrespective whether the party spends the funds *independently*. That handiwork reflects the use not of a sharp and sure legislative scalpel but a blunt and misdirected bludgeon. *See NCPAC*, 470 U.S. at 501 ("We are not quibbling over fine-tuning . . . but are concerned about wholesale restriction of clearly protected conduct."). The ban is not narrowly tailored; indeed, it is not tailored at all.

* * *

New FECA section 323(a)'s ban on national party use of non-federal funds fails to serve the government's interest in preventing actual or apparent corruption of federal candidates and, worse, it indiscriminately restricts independent expenditures disbursed for protected issue advocacy and non-corrupting party-building activities. In my opinion, the ban is substantially overbroad, *see supra* Part IV.D.1.b.(2), and represents an impermissible burden on the expressive associational rights of the national political party committees and their donors, *see Sweezy*, 354 U.S. at 250 (plurality opinion) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."). Accordingly, I would hold that it is unconstitutional on its face.



c. Sections 301(20) and 323(b) Fail Strict Scrutiny

Under strict scrutiny, sections 301(20) and 323(b)—which restrict state and local party spending of non-federal funds for "Federal election activity"—likewise fall far short of passing constitutional muster. I conclude below that (1) the state and local party restrictions do not serve the government's interest in preventing actual or apparent corruption of *federal* candidates; and (2) even if the restrictions did retard corruption, they are not narrowly tailored.

(1)

The plaintiffs suggest that to the extent section 323(a) is constitutionally invalid, section 323(b) must be struck down on grounds of inseverability. *See, e.g.*, RNC Br. at 71 ("[W]ere § 323(a) struck down and national parties freed to use nonfederal money, § 323(b) would cease to have any real effect. . . ."); RNC Opp. Br. at 48. At least one defense expert opined to the same effect:

> Q: . . . If the provision[ ] restricting national party committees were struck down, would it make sense to continue the restrictions on state and local parties?
>
> A: In this case, the whole effort would be lost. . . . [The national parties] would no longer need state and local parties as, as vehicles. . . . [Y]ou have already lost the whole show if the national party soft money ban is declared unconstitutional. If it's gone, it's hard for me to see how the court would then find a rationale for maintaining the limits in the law [on] state and local parties.

Cross Exam. of Def. Expert Mann at 110. While I am inclined to agree, I do not believe it necessary to decide whether the state party restrictions are severable—sections 301(20) and 323(b) cannot be sustained even on their own terms.

To repeat, *see supra* Part II.D, sections 301(20) and 323(b) limit state and local party committee spending of non-federal

funds on "Federal election activity," which is defined broadly as (1) any voter registration activity within 120 days of a regularly scheduled federal election; (2) voter identification, get-out-the-vote activity or generic campaign activity conducted "in connection with" any election in which a federal candidate appears on the ballot; (3) issue advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks" or "opposes" a candidate for that office, regardless when the advocacy occurs and how it is transmitted; and (4) services provided by a state or local party employee who spends more than 25 per cent of his paid time during any one month on activities "in connection with" a federal election. BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). As a general rule, a state or local party committee must pay for such activities solely with funds subject to FECA's source-and-amount restrictions, *see* BCRA § 101(a); FECA 323(b)(1); 2 U.S.C. § 441i(b)(1), which are substantially more stringent than those of many States. *See* Br. of *Amici Curiae* Delaware et al. at 5-8 (discussing "diverse array" of state campaign finance laws and noting 29 States permit corporate treasury contributions to state candidates (capitalization altered)); *see also* CDP Br. at 8 (current California campaign finance law "was specifically designed to allow the political parties . . . to play a greater role in State and local elections, on the theory that empowering the parties to raise and spend more money relative to candidates reduced the appearance and threat of corruption by providing an 'insulating' effect between large contributors and candidates"). The Levin Amendment carves out a heavily-conditioned exception to the general rule against state-party spending of non- federal funds on the four classes of "Federal election activity." Under the Levin Amendment, a state or local party committee may spend an FEC-specified amount of federally-regulated "Levin funds" on voter registration, voter identification, generic campaign activity and get-out-the-vote activity as long as (1) the



activity does not refer to a federal candidate; (2) the funds are not spent on any broadcast communication, unless the broadcast refers solely to a state or local candidate; (3) no person donates more than $10,000 to the committee; and (4) the funds spent are raised exclusively by the spending committee itself. *See* BCRA § 101(a); FECA § 323(b)(2)(B); 2 U.S.C. § 441i(b)(2)(B). If any *one* of these conditions is unmet, all bets are off; the committee may not reap the narrow benefits of the Levin Amendment and must pay for the listed activities with funds subject to FECA's source-and-amount limits.

The defendants assert that the restrictions on state and local party committees "are supported by the same interests as the ban on [the use of] soft money by national party committees." Gov't Br. at 100. I think it more accurate to say that sections 301(20) and 323(b) are *unsupported* by the same interests. The defendants could not cite a single instance of "dollars-for-political- favors" corruption, *NCPAC*, 470 U.S. at 497, stemming from donation of non- federal funds to the national party committees. *See supra* Part IV.D.1.b. They fail again with respect to state and local party committees. *See supra* Finding 80 at pages 180-83; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-4; McCain Dep. at 170-71; Feingold Dep. at 132; Snowe Dep. at 206-07; Jeffords Dep. at 107. And while they repeatedly recount as an exhaustive set of corruptive examples the "access and influence afforded Roger Tamraz, James Riady and Carl Linder [sic] after they made large contributions to various state Democratic parties," Intervenors Opp. Br. at 13 n.38 (citing Intervenors Br. at 32-33), they have not established a convincing link between nonfederal donations to state parties on the one hand and "access" to federal candidates on the other. *See supra* Findings 80c, 81b-81c atpages 182-83, 185-87; *see also, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence that "officeholders are more likely to meet with donors of non-

federal money than with donors of federal money"). It is not surprising, then, that the defendants barely attempt to justify the state party restrictions as a *direct* means of preventing actual or apparent *quid pro quo*, or even "access," corruption; their primary contention instead is that the restrictions are necessary to prevent circumvention of the constitutionally flawed national party ban. *See, e.g.*, Gov't Br. at 103 ("If BCRA only regulated soft money contributed to national party committees, donors would simply funnel soft money in unlimited amounts to state and local party committees to influence federal elections . . . ."); Intervenors Br. at 13, 59 (same); Intervenors Opp. Br. at 29-30 (same); *see also* 147 CONG. REC. S2928 (daily ed. Mar. 27, 2001) (statement of Sen. Schumer) ("[R]egulating soft money without dealing with the soft money that goes to State parties is like the person who drinks a Diet Coke with his double cheeseburger and fries: It does not quite get the job done."). As the *CDP* plaintiffs point out, however, "the circumvention rationale is only valid to the extent that [BCRA] prevents violation of the [Act's] underlying contribution limits," which are designed to prevent actual or apparent corruption of federal candidates. CDP Opp. Br. at 16 (emphasis omitted). Although the defendants would have us believe the "Congress recognized that allowing state-level party committees to expend unlimited amounts of unregulated funds on activity that influences federal elections would ... promote the appearance and reality of political corruption," Gov't Br. at 100, their assertion is flawed in at least four respects, *see infra;* indeed, the record leads me to conclude that sections 301(20) and 323(b) are not targeted to prevent actual or apparent corruption.

*First*, the Congress *qua* Congress made no findings of fact in support of BCRA generally or the state- and local-party restrictions specifically. Accordingly, and especially through the lens of strict scrutiny, I view with a good deal of skepticism the defendants' reliance on sound-bite legislative history thought to support the notion that sections 301(20)



and 323(b) are "necessary . . . to protect the integrity of Federal elections." Gov't Br. at 100 (citing 148 CONG. REC. S2138-39 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)); *see Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (deriding congressional "evidence consist[ing] almost entirely of isolated sentences clipped from floor debates and legislative reports," most of which was anecdotal or resembled *ipse dixit* reasoning); *see also supra* pages 64-65. As evidenced by the House Committee on Administration's "Adverse Report" on both the national and state provisions, the legislative history is, at the very least, inconsistent on the necessity of sections 301(20) and 323(b):

> No evidence has been produced to this Committee of a "corruption" problem stemming from soft money contributions to political parties. Even if there had been such a showing, H.R. 2356 does not even attempt to be a narrowly tailored remedy. If it were ever to become law, it would have precisely the opposite effect its proponents intend. Rather than diminish the power of "special interest" groups, it would actually make those groups even more powerful than they are today.

H.R. REP. NO. 107-131, pt. 1, at 2 (2001).

*Second*, donations to state and local party committees are neither unlimited nor unregulated. If such funds are directed to influencing state elections, they are ordinarily regulated by state law. *See generally* Br. of *Amici Curiae* Delaware et al. More importantly, if such funds are donated "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i), they are "contributions" already subject to FECA's source-and-amount restrictions. *See, e.g.*, BCRA § 102; FECA § 315(a)(1)(D); 2 U.S.C. § 441a(a)(1)(D) ("[N]o person shall make contributions . . . to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000."); 2 U.S.C. § 441a(a)(2)(C) ("No

multicandidate political committee shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000."); 2 U.S.C. § 441a(a)(8) ("[A]ll contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate."); 2 U.S.C. § 441b(a) ("It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any [federal] election . . . ."). In light of preexisting federal law, the defendants' charge that state-party use of non-federal funds "distort[s] the legislative process" and "is inherently, endemically, and hopelessly corrupting," Gov't Br. at 81 (quoting Rudman Decl. at 4), is hyperbolic. In litigation involving a state political party committee, the Supreme Court itself recognized that under FECA "[u]nregulated 'soft money' [donations] may not be used to influence a federal campaign, except when used in the limited, party-building activities specially designated in the statute." *Colorado Republican I*, 518 U.S. at 616 (plurality opinion) (citing 2 U.S.C. § 431(8)(B)). It observed further that "[a] party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions." *Id.* at 616-17.

*Third*, the defendants resist the plain import of FECA and *Colorado Republican I*, asserting that "soft money, by definition, is nothing more than a donation that exceeds FECA's contribution limits or comes from a source that the statute prohibits." Gov't Opp. Br. at 1. As the *CDP* plaintiffs demonstrate, however, much non-federal money is raised at the state and local levels, *see supra* Finding 75a.3 at pages 170-71, and little if any of it is used "for the purpose of influencing" a federal election, *see supra* Finding 73 at pages



164-68; *see also, e.g.*, CDP Br. at 4 (California Democratic and Republican parties have traditionally spent majority of non-federal resources on state and local ballot measures and elections for state and local offices (citing Bowler Decl. at 5; Erwin Decl. at 5)); CDP Opp. Br. at 5-6. Quoting former Senator Thompson, the defendants nonetheless insist that state party spending of non-federal funds—especially on issue advocacy that happens to mention a federal candidate—"affects" federal elections and therefore has the "potential" to corrupt federal candidates:

> Republican and Democratic Senate candidates set up joint fundraising committees, joining with party committees, to raise unlimited soft money donations. The joint committees then transferred the soft money funds to their Senate party committees, which transferred the money to their state parties, which spent the soft money on "issue ads" . . . promoting . . . federal candidates[.]

Gov't Br. at 101 (quoting 147 CONG. REC. S3251 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson)). Against the backdrop of FECA, the defendants' assertions and BCRA's restrictions on state and local parties reflect little more than frustration with First Amendment principles firmly rooted in *Buckley*, *Citizens Against Rent Control* and *Colorado Republican I*. Taken together, these cases hold that the Congress cannot constitutionally regulate non-federal donations to political parties if the funds are then spent independently of a candidate—whether for issue advocacy or for generic party-building activities—given that "the opportunity for corruption posed by" such funds "is, at best, attenuated." *Colorado Republican I*, 518 U.S. at 616 (plurality opinion); *see Buckley*, 424 U.S. at 45 ("So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."); *see also Citizens Against Rent Control*, 454

U.S. at 299 ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

*Fourth*, the defendants' evidence that non-federal donations to state and local parties "raise the possibility of the *appearance* of corruption," Feingold Dep. at 196 (emphasis added), is no stronger than their evidence (or notable lack thereof) that such donations have in fact produced political favors from federal candidates. *See supra* Finding 82 at pages 189-93. Characteristic "evidence" of apparent corruption can be found in a string cite in the government's opposition brief:

> [D]efendants have presented considerable evidence of soft money donations that at the very least appear to have been made to secure political *quid pro quos*. *See* . . . Simon Decl. ¶ 13 ("[I]t is not unusual for large contributors to seek legislative favors in exchange for their contributions."); Simpson Decl. ¶ 10 ("[D]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform."); Hickmott Decl. ¶ 9 (corporate donors frequently give soft money to parties to "influence the legislative process for their business purposes"); Andrews Decl. ¶ 7 ("Those who are able to provide the largest sums of money are often more likely to have more consideration given to their views. Not only does it help provide a foot in the door into a federal elected official's office and a chance to make the donor's pitch, but also it naturally may tend to foster a more sympathetic hearing."). Congress noted similar concerns. *See, e.g.*, 147 CONG. REC. S3107-10 (daily ed. Mar. 29, 2001) (Sen. Feingold) ("[I]t is important for us to acknowledge that millions of dollars are given in an attempt to influence what we do.").

Gov't Opp. Br. at 16 n.18 (bracketed evidentiary citations omitted); *see* Gov't Br. at 79-81 (quoting similar sources); *see also, e.g.*, McCain Decl. at 3 ("I believe, based on my



experience, that elected officials do act in particular ways in order to assist large soft money donors and that this skews and shapes the legislative process."). Of course, the statute's sponsors and supporters are not the Congress itself. And, as I have mentioned, the Congress made no finding that non-federal donations to state and local parties appear to corrupt federal elections; indeed, it made no findings in support of BCRA whatsoever. The Supreme Court views with skepticism evidence that "consists not of legislative findings, but of unexamined, anecdotal accounts." *Bd. of Trustees v. Garrett*, 531 U.S. 356, 370 (2001); *see Kimel*, 528 U.S. at 89 (same); *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997) (same); *Lopez*, 514 U.S. at 562 (striking down provision of Gun Free School Zones Act because, *inter alia*, "[n] either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone"). Skepticism is particularly appropriate in the context of First Amendment strict scrutiny, where "the usual presumption of constitutionality afforded congressional enactments is reversed." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817, 822 (2000) (to carry burden of strict scrutiny under First Amendment, government "must present more than anecdote and supposition"); *see Landmark Communications*, 435 U.S. at 841 (striking down speech restriction subject to strict scrutiny where government "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined"); *see also CIO*, 335 U.S. at 145 (Rutledge, J., concurring in judgment) (First Amendment "forces upon [a speech restriction's] authors the burden of justifying the contraction by demonstrating indubitable public advantage arising from the restriction outweighing all disadvantages, thus reversing the direction of presumptive weight [applicable] in other cases"). As I have mentioned, *see supra* pages 64-65, the Court has also made clear that the

Congress may not justify the infringement of constitutionally protected liberties with rationalizations that are "hypothesized or invented post hoc in response to litigation." Virginia, 518 U.S. at 533. Accordingly, the post-enactment anecdotal record amassed in this court to suggest that non-federal donations to state parties appear to corrupt federal candidates, see Intervenors Br. at 32-38; see generally Andrews Decl.; Feingold Decl.; Geshke Decl.; Hassenfeld Decl.; Hiatt Decl.; Hickmott Decl.; Kirsch Decl.; McCain Decl.; Rudman Decl.; Simon Decl.; Simpson Decl.; Wirth Decl., is no substitute for the record that should have been assembled down the street in the years leading up to BCRA's passage.

In the campaign finance context, the courts "have never accepted mere conjecture as adequate to carry [the] First Amendment burden." Shrink Missouri, 528 U.S. at 392. I am unwilling to start now. The defendants' hypothesis that non-federal donations to state and local political party committees appear to corrupt federal candidates is an especially novel one given that such donations, by definition, are *not* made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Thus, because the defendants have proffered no convincing empirical evidence in support of their theory, cf. McCain Dep. at 195 ("I've campaigned all over America, and I've seen the air waves inundated with soft money attack ads, and that was not the way it was before the loopholes were opened. *So I don't have to have statistics.*" (emphasis added)), I believe that they have failed to carry their substantial evidentiary burden. *See Shrink Missouri*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Sections 301(20) and 323(b) cannot withstand strict scrutiny because they do not serve a compelling governmental interest; on this record, actual or apparent corruption of federal candidates "remains a hypothetical possibility and nothing more." *NCPAC*, 470 U.S. at



498; *see Austin*, 494 U.S. at 689 (Scalia, J., dissenting) ("[T]he mere potential for harm does not justify a restriction upon speech. . . ."); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The question in every case is whether the [speech is] used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent.").

(2)

Sections 301(20) and 323(b) apply wholesale to state and local party expenditures for state-focused election activities that barely affect federal elections on the theory that they may *potentially* corrupt a given federal candidate. *See, e.g.*, Intervenors Opp. Br. at 13; Feingold Dep. at 196 (unlimited non-federal donations to state and local parties "raise the *possibility* of the appearance of corruption" (emphasis added)). I conclude in the following discussion that even if sections 301(20) and 323(b) served in some instances to prevent corruption or its appearance, *but see supra* Part IV.D.1.c.(1), they could not survive strict scrutiny because they are not narrowly tailored. In my view, the provisions restrict too much non-corrupting political speech.

It is undisputed that state and local party committees undertake "mixed" activities on behalf of both state and federal candidates; they pay overhead expenses, mobilize full-ticket voting, communicate with party supporters and engage in certain "joint" advertising. *See supra* Findings 72a, 72c, 73b-73e, 74 at pages 162-63, 166-69; *see also, e.g.*, Benson Decl. at 3 (describing Colorado Republican Party programs that "support the entire ticket" but "often place a greater emphasis on state-wide and state legislative races than on federal races"); Cardenas Decl. at 3-4 (describing Florida Republican Party's payment of mixed activities); Dendahl Decl. at 6-12 (describing certain "ticket-wide" activities of New

Mexico Republican Party). And it is no doubt true, as the defendants repeatedly assert, that "[b]ecause the partisan proclivities of the electorate express themselves toward *both* state and federal candidates, state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office." *E.g.*, Gov't Opp. Br. at 27 (quoting Green Expert Report at 13 (emphasis in original)). Manifesting this fact, the FEC's pre-BCRA allocation regulations required that a certain percentage of federal funds be used on mixed activities to the extent that voter identification, voter registration, get-out-the-vote drives and "other activities that urge the general public to register, vote or support candidates of a particular party" affected simultaneous federal elections. 11 C.F.R. § 106.5(a)(2)(iv) (2001); *see supra* Findings 72a, 72c at pages 162-63; *see also* TWENTY YEAR REPORT, *supra*, ch.3 ("Some expenses incurred by [state and local party] committees . . . may in fact relate to both federal and nonfederal elections. Party committees, for example, may purchase generic get-out-the-vote advertisements that benefit both their federal and nonfederal candidates. To pay for these ads, committees must use federal funds for the portion that benefits federal candidates, but may use soft money for '. . . the portion that benefits nonfederal candidates[.]'"); CDP Opp. Br. at 6 n.5 (in 2000 election cycle FEC regulations required the CDP "to pay all administrative, generic [get-out-the-vote] and general party-building activities with at least 43% *federal* money" (emphasis in original)). Sections 301(20) and 323(b), however, abandon the rough balance struck by the allocation regulations. They require state parties to spend federal funds on activities that will not plausibly corrupt any federal candidate. Consider an example the *CDP* plaintiffs raised at oral argument. In 1996 the CDP used non-federal funds to pay for the following radio ad



> urging the California electorate to vote against a controversial ballot initiative: Tuesday is the day we decide whether we let them turn back the clock on us. Because Tuesday is election day, the day we can vote down Governor Wilson's scheme to take away our civil rights and end our chance for fairness. The Republican scheme is Prop. 209 and it would eliminate affirmative action which helps make our society fair and gives every one of us a fair chance at the American dream. But to say yes to fairness and no to mean-spirited Prop. 209, we have to say yes to voting. On Tuesday, we must go to the polls and cast a most important vote for fairness, for affirmative action—a vote against Prop. 209. Vote No on 209. Vote no on the Republican scheme to turn the clock back and shut down equal opportunity for all. On Tuesday, vote yes for our future and no on Prop. 209. Don't let the Republicans get away with it. Don't stay home. That's what they're counting on. Paid for by the California Democratic Party.

Feingold Dep. Exh. 15. Conceding that sections 301(20) and 323(b) would require the CDP to fund the foregoing ad with federal money,[166] the intervenors contend that "it is inconceivable that an ad like this, which encourages voters to go to the polls to ensure that 'Republicans [don't] get away with it,' would have no effect on the contemporaneous federal

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[166] The government contends that under the FEC's newly-issued regulations, the radio ad would not constitute get-out-the-vote activity because it was not disseminated by "*individualized* means." Gov't Opp. Br. at 31 (quoting 11 C.F.R. § 100.24(a)(3) (emphasis the government's)). As the *McConnell* plaintiffs demonstrate, however, if the CDP simply "'broadcast' the same advertisement via a phone bank, rather than the radio, and did so within 72 hours of the election, it would still constitute get-out-the-vote activity even under the FEC's regulations." McConnell Reply Br. at 9-10. The CDP ad would be no less speech and no more corrupting of a federal candidate if transmitted by phone than if broadcast on the radio.

election." Intervenors Opp. Br. at 11 n.30, 31-32. Their contention, even if correct, is irrelevant. The Congress cannot, consistent with First Amendment strict scrutiny, limit a political party's pooling of individual, corporate or union donations to pay for an ad that so plainly has no corrupting effect, real or imagined, on any federal candidate or officeholder. As the Court held in *Bellotti*,

> [t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it[.]

*Bellotti*, 435 U.S. at 790; *see* Intervenors Opp. Br. at 20 n.49 (noting that Court invalidated contribution-to-committee limit in *Citizens Against Rent Control* because "the recipient committee had been formed to support a local ballot measure" and "the Court found [that] there was no risk of actual or apparent corruption" (citing *Citizens Against Rent Control*, 454 U.S. at 292, 298)). I note a few more of the *CDP* plaintiffs' examples of state-oriented, non-corrupting "Federal election activit[ies]" the non-federal funding of which sections 301(20) and 323(b) restrict:

> 1. A generic get-out-the-vote mailer stating: "Our Vote is Our Voice. Keep Asian Pacific American families moving forward. Vote Democrat." CDP App. at 177; *see* Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 3 (admitting mailer is "Federal election activity" under BCRA and FEC regulations and must be paid for either entirely with federal funds or with a combination of federal funds and Levin funds).
>
> 2. A generic get-out-the-vote newspaper advertisement stating: "On Nov. 5th, We're Voting for Ourselves. Vote Democratic '96. It's Too Important Not To." CDP App. at 180;*see* Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 4 (admitting advertisement is "Federal election activity" under BCRA and FEC regulations and must be paid for entirely with federal funds).



> 3. A get-out-the-vote phone script featuring Jesse Jackson urging voters: "On November 7th, your vote is not just about candidates. We need everyone in our community voting to defeat Prop. 38[,] the school voucher initiative. Prop. 38 brings new discrimination to our schools. Our children can be turned away based on test scores, religion or even family income. I urge you to get out to vote on November 7th. Vote no on Prop. 38, KEEP HOPE ALIVE!!!" CDP App. at 197; *see* Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 5 (admitting phone script is "Federal election activity" under BCRA and FEC regulations and must be paid for entirely with federal funds).
>
> 4. A get-out-the-vote mailer urging addressees to "Give Anaheim two strong voices" by voting for Gray Davis and Tom Daly for state office "on November 3," a date on which a candidate for Federal office also appeared on the ballot. CDP App. at 51.

*See generally* CDP Br. at 17-20 & nn.16-20. The first of these communications features the name and likeness of Norman Y. Mineta and notes (in very small print) that he is the "[f]irst Asian Pacific American in history to be appointed to a cabinet position." CDP App. at 177. None of the other communications mentions anyone even remotely tied to federal office, much less a federal candidate. Thus, none of them poses anything more than a "hypothetical possibility" of *corrupting* a federal candidate. *NCPAC*, 470 U.S. at 498. Yet every one

of these core speech activities must be funded either entirely with federal funds or with strictly-limited Levin funds.[167]

If the Congress was concerned about the allegedly corrupting effect of state-oriented "Federal election activit[ies]" that might (or might not) incidentally affect a federal election, it was troubled for naught. Nothing in the record remotely suggests that the "Federal election activit[ies]" listed above corrupt or appear to corrupt federal candidates. And whether or not BCRA's sponsors and supporters have also overstated their concern that state and local parties have operated as "pass-through accounts for . . . large, direct contributions from corporations, unions, and wealthy individuals," *e.g.*, Intervenors Br. at 35 (quoting 148 CONG. REC. S2138-39 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)), sections 301(20) and 323(b) do not represent a narrowly tailored response. If conduit corruption is indeed a problem at the state-party level, the most measured solution is stronger enforcement of provisions that already regulate "contributions" made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). As I noted earlier, the Court itself has observed that under FECA

> [a]ny contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limitations. § 441a(a)(8). A party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions and are subject to the contribution limits on a "multicandidate political committee." § 441a(a)(2).

[167] The government claims that certain of these flyers and mailers would be excepted from section 323(b) by FEC regulation, "particularly if [they are] 'mass mailing[s]' of over 500 pieces." Gov't Opp. Br. at 31. The intervenors make no such argument because some of them are currently challenging the regulation on which the government relies. *See Shays v. FEC*, No. 02-CV-1984 (D.D.C., filed Oct. 8, 2002). Even if the government is correct about the regulation (and the regulation withstands APA review), its argument has little bearing on the outcome of the facial challenge before us; as the RNC demonstrates, if a state-focused flyer or mailer "is mailed to 499 homes, or is 'individualized' by hand-delivery to 10,000, or if the [same] message is by phone, it *is* covered by § 323(b)" even under the regulations. RNC Reply Br. at 9-10 n.5 (emphasis in original).



*Colorado Republican I*, 518 U.S. at 616-17 (plurality opinion); *see Colorado Republican II*, 533 U.S. at 481 (Thomas, J., dissenting) ("Vigilant enforcement of [the earmarking] provision is a precise response to . . . circumvention concerns. If a donor contributes [$4,000] to a candidate (the maximum donation in an election cycle), he cannot direct the political party to funnel another dime to the candidate without confronting the Federal Election Campaign Act's civil and criminal penalties . . . ."). Finally, if the problem is that "the six national political party committees transferred over $420 million in hard and soft money to state and local parties during the 2000 election cycle, principally for the purpose of influencing federal elections through 'issue ads,'" Intervenors Opp. Br. at 13; *see* McCain Dep. at 193 ("It's the broadcast television and radio ads that we believe are what is the problem."), it is one problem the Congress lacks the constitutional authority to solve. Under the Court's case law, party issue advocacy is entitled to full First Amendment protection and may not be regulated (even on the supply side) if expenditures therefor are disbursed independently of a candidate's campaign.[168] *See Colorado*

[168] Significantly, new FECA sections 301(20) and 323(b) are substantially broader than the facially overbroad "electioneering communication" provisions of BCRA Title II inasmuch as they restrict party issue advocacy transmitted at any time and by any means (besides the internet). *See* BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (definition of "Federal election activity" includes "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication

*Republican I*, 518 U.S. at 618 (plurality opinion) ("We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."); *Citizens Against Rent Control*, 454 U.S. at 299-300; *Buckley*, 424 U.S. at 45-47; *see also* Smith, *Hard Realities*, *supra*, at 199. And even if issue advocacy funded by transfers from the national parties were within the Congress's regulatory reach, sections 301(20) and 323(b) must target that "problem" more precisely than they do, perhaps by prohibiting *only* national party transfers[169] and permitting state parties to raise non- federal funds without limit. *See* CDP Br. at 32. Moreover, as the *CDP* plaintiffs aptly point out,

> a cap on [non-federal] spending (i.e., the $10,000 Levin limit) that is not adjusted in any way for the size of the [S]tate or the population to be reached presents particular problems for large [S]tates such as California. With all due respect to Senator McCain, when the cost of one statewide mail piece is approximately $260,000 (Bowler Decl. [at] 20), $10,000 does *not* allow for a lot of communication. McCain Dep. [at] 278 ("You can print a lot of handouts for $10,000."). . . . The [California] parties cannot possibly raise the money under the federal limits necessary to reach a massive California audience in a meaningful way. . . . Congress has failed to properly narrow the focus of "federal" activities in any

expressly advocates a vote for or against a candidate)"); *see also* 67 Fed. Reg. at 49111 ("The term public communication shall not include communications over the Internet.").

[169] Of course, even this restriction would raise serious constitutional questions. *See, e.g.*, CDP Br. at 36 et seq. (arguing that BCRA's "prohibitions on transfers" themselves "impose substantial burdens that are not narrowly tailored to meet a compelling government interest" (capitalization altered)).



> meaningful way, and has imposed a limit upon the parties' abilities to spend state funds that is completely unrelated to the likelihood of corruption or the appearance of corruption of federal candidates.

CDP Br. at 32, 34 (emphasis in original). I agree. In unrestrained fashion, sections 301(20) and 323(b) "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. They fail the narrow tailoring requirement of First Amendment strict scrutiny.

* * *

New FECA sections 301(20) and 323(b)'s restrictions on state and local party use of non-federal funds fail to serve the compelling governmental interest in preventing the actual or apparent corruption of federal candidates. Moreover, they invalidly inhibit core political speech directed in the main toward state and local candidates and issues. I believe that the provisions are substantially overbroad, *see supra* Part IV.D.1.c.(2), and impermissibly burden the expressive associational rights of state and local political party committees and their donors, *see Sweezy*, 354 U.S. at 250 (plurality opinion). Therefore, I would hold that they are unconstitutional on their face.

2. Fundraising Costs: New FECA Section 323(c)

New FECA section 323(c) requires any national, state or local political party committee to use federal funds to raise any money that is expended or disbursed for "Federal election activity." BCRA § 101(a); FECA § 323(c); 2 U.S.C. § 441i(c). The provision demands only passing attention. Having concluded that FECA section 301(20)'s definition of "Federal election activity" cannot be sustained, *see supra* Part IV.D.1.c., and despite BCRA section 401 ("If any provision of this Act . . . is held to be unconstitutional, the remainder

. . . shall not be affected by the holding."). I would hold that section 323(c) is inseverable and therefore invalid as well. As the Supreme Court made clear long ago, a statutory provision

> cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. . . . [A severability clause] provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.

*Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (Brandeis, J.). Because the purpose for which section 323(c) fundraising is intended—that is, for "Federal election activity"—cannot be met, no coherent legal effect can be given to section 323(c), which I believe must be struck down with section 301(20).

3. Tax-Exempt Organizations: New FECA Section 323(d)

I analyze at greater length section 323(d), which prohibits any national, state or local political party committee or its agents from "solicit[ing] *any* funds for, or mak[ing] or direct[ing] *any* donations to" (1) an organization that is described in section 501(c) of the Internal Revenue Code of 1986, is exempt from taxation and "makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (2) an incorporated political organization (other than a political committee) described in section 527 of the Code.[170] BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d) (emphases added). Like section 323(c),

[170] Two examples of section 527 organizations covered by new FECA section 323(d) are (1) the Democratic clubs to which the CDP donates funds for state-focused grassroots, voter registration and get-out-the-vote activities, *see supra* Finding 77b at page 175; and (2) the organizations participating in the CRP's Operation Bounty voter registration drives, *see supra* Findings 73b.4, 77b at pages 166, 175.



section 323(d) incorporates the term "Federal election activity." I would not decide whether section 323(d) is severable, however, because I believe the provision would fail First Amendment review even if it did not include that tainted term.

* * *

Like its counterparts at sections 323(a) and (b), section 323(d) limits the associational activities of any national, state or local political party committee by prohibiting it from giving non-federal funds to groups engaged—*independently* of any federal candidate—in core political activities like voter identification and registration, get-out-the-vote drives and, of course, unbridgeable issue advocacy. *See supra* Part IV.D.1. But the provision does not stop there. Section 323(d) prohibits any political party committee or its agents from donating even *federal* funds to a tax-exempt 501(c) organization making expenditures "in connection with" a federal election, or to a section 527 organization *whether or not* the organization spends the funds "in connection with" a federal election. As I have discussed, *see supra* Part IV.D.1.a, the Supreme Court has been quite clear that in the campaign finance context there exists only "a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*." *Citizens Against Rent Control*, 454 U.S.at 296-97 (emphasis in original). Accordingly, I have strictly scrutinized BCRA's restrictions on non-federal funds insofar as they operate to inhibit the political speech of those who donate non-federal funds to the parties in order to participate in collective, protected issue advocacy *via* a party's independent expenditures. Strict scrutiny is no less appropriate when a political party committee donates funds to a tax-exempt organization than when it accepts donations from corporations, labor unions and individual citizens. In both instances, the party facilitates the "[d]iscussion of public issues and debate on the

qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Moreover, a party's political speech is often "undeniably enhanced by [its] group association" with a tax-exempt organization. *NAACP v. Alabama*, 357 U.S. at 460.

Consider once again a concrete example from the State of California. In any given election, California voters consider a large number of state and local ballot measures pertaining to any number of legislative matters. *See supra* Findings 73a.5, 76a at pages 165-66, 172-74; *see also, e.g.*, Bowler Decl. at 15 (San Francisco general ballot in November 2002 contained seven statewide measures and 20 local measures). Recently, such issues as affirmative action, education of immigrant children, welfare reform, restrictions on union membership and term limits have been the subject of ballot initiatives. *See* Bowler Decl. at 24. Significantly, most committees formed to support or oppose ballot measures in California are tax-exempt 501(c)(4) organizations. *See supra* Finding 77a at page 175; *see also, e.g.*, Bowler Decl. at 24. Under section 323(d), the CDP is prohibited from giving *any* funds (federal or non-federal) to a 501(c)(4) ballot-measure organization that purchases a radio ad like the one urging the California electorate to vote against Proposition 209, a ballot measure that would eliminate affirmative action in the State. *See* Feingold Dep. Exh. 15; Resp. of Intervenors to CDP's First Set of Reqs. for Admis. at 10 (admitting that section 323(d) would prohibit such a donation). It is hard to imagine speech more eligible for First Amendment protection. But by barring the CDP from donating non-federal funds to the ballot-measure organization, section 323(d) stifles such speech; it "automatically affects" the organization's expenditures, *Citizens Against Rent Control*, 454 U.S. at 299, which are "in connection with an election for Federal office" only because a federal candidate appears on the same ballot as the state initiative. BCRA § 101(a); FECA § 323(d)(1); 2 U.S.C.



§ 441i(d)(1). The defendants argue that the provision's broad restraint on the trade of political ideas is justified as a means to "prevent the parties from collecting soft money and laundering it through other organizations engaged in federal electioneering." Gov't Br. at 117 (quoting 148 CONG. REC. S1992 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold)). Under settled First Amendment jurisprudence, however, section 323(d) cannot be justified on this ground or any other.

*First*, as the government acknowledges, section 323(d) operates as a "restriction on the general freedom to [use] *hard money*." Gov't Reply Br. at 27 (emphasis added). Therefore, even if the Congress enacted the provision with an eye toward preventing the "laundering" of "soft money," section 323(d) goes well beyond circumvention prophylaxis, which is itself a questionable governmental objective in the realm of political speech. *See NAACP v. Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect.").

*Second*, to the extent the Court has recognized an "anti-circumvention" rationale, it has carefully limited the application of that governmental interest to circumstances in which the disbursement of funds may corrupt a federal candidate. *See Colorado Republican II*, 533 U.S. at 464-65 (while coordinated party expenditures have "power to corrupt" candidates, independent party expenditures do not "form[ ] a link in a chain of corruption-by-conduit" and do not subvert Act's contribution limits (citing *Colorado Republican I*, 518 U.S. at 617 (plurality opinion))); *NCPAC*, 470 U.S. at 496-97; *see also Colorado Republican I*, 518 U.S. at 623 (plurality opinion) ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions" (citing *Bellotti*, 435 U.S. at 790)). The intervenors' exaggerated assertion to the contrary notwithstanding, *see* Intervenors Opp. Br. at 46 ("[B]allot measure committees are just as susceptible to the parties' campaign finance machinations as any other group."), I believe that a *state* party's donation to

a *state* ballot measure organization that opposes a *state* initiative poses no risk of corrupting (or appearing to corrupt) any *federal* candidate.[171] *See Citizens Against Rent Control*, 454 U.S. at 297-98; *Bellotti*, 435 U.S. at 790; *see also* Gov't Opp. Br. at 36 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (quoting *McIntyre*, 514 U.S. at 352 n.15)).

*Third*, the defendants' "evidence" of section 323(d)'s prophylactic necessity is insufficient to support the provision:

> Congress recognized that tax-exempt organizations served as virtual arms of party committees, conducting federal electioneering activities to benefit candidates of a particular party without being subject to any of the funding source or contribution limitations or disclosure requirements that are applicable to party committees. For example, the RNC infused Americans for Tax Reform ("ATR"), a 501(c)(4) tax-exempt organization, "with over $4.5 million in the weeks leading up to the 1996 election," and ATR then paid "its bills for a direct mail and phone bank campaign involving four million calls and 19 million pieces of mail explicitly disputing the Democrats' position on Medicare as it related to the November 5th election." 144 CONG. REC. S840 (Feb. 23, 1998) (Sen. Lieberman). The DNC engaged in similar conduct. . . . Moreover, donations solicited or directed by national party committees to benefit tax-exempt organizations that conduct political activities create the same *potential* problems of corruption that other unregulated fund-raising by the national parties engenders, i.e., the creation of obligated officeholders, and of donors who feel compelled to contribute in order to obtain access to, and consideration from, federal officials.

Gov't Br. at 117-18 (emphasis added); Gov't Opp. Br. at 38 n.39 (citing 144 CONG. REC. S1048 (daily ed. Feb. 26, 1998) (statement of Sen. Glenn) (in 1996 "soft money" "supplied the funds parties used to make [donations] to tax-exempt groups, which in turn used the funds to pay for election-related activities"); 144 CONG. REC. S977 (daily ed. Feb. 25, 1998) (statement of Sen. Levin) ("These soft money and issue ad loopholes are used to transfer millions of dollars to outside organizations to conduct allegedly independent election-related activities that are, in fact, benefiting parties and candidates."); 144 CONG. REC. S898 (daily ed. Feb. 24, 1998) (statement of Sen. Ford) ("[W]e now know that many of these so-called independent organizations, many claiming tax- exempt status, are established, operated, and financed by parties and candidates themselves—and their finances are totally unregulated.")); *see* Intervenors Opp. Br. at 47 (recounting that CDP in 1999 violated FEC regulations by contributing more than $700,000 to tax-exempt organization opposing state spending reduction referendum). If this is the best the defendants have to offer, I am unimpressed. The Congress *qua* Congress has never "recognized that tax-

[171] The government, which wisely makes no attempt to minimize the First Amendment value of speech regarding ballot measures, observes that "although BCRA regulates [donations] by political parties to tax-exempt organizations, the statute leaves the party committees entirely free to make *independent expenditures* to support or oppose a ballot measure." Gov't Reply Br. at 28 (emphasis in original). The Court has made clear, however, that the danger of corruption is absent in the ballot-measure context, *see Citizens Against Rent Control*, 454 U.S. at 297-98; *Bellotti*, 435 U.S. at 790, and that "[t]he First Amendment . . . presume[s] that speakers, not the government, know best both what they want to say and how they want to say it." *Riley*, 487 U.S. at 790-91; *see Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). Therefore, if the CDP believes its message about affirmative action will be more effective if channeled through a ballot- measure organization than if funded directly, the First Amendment guarantees it that choice.

exempt organizations serve[ ] as virtual arms of party committees." Gov't Br. at 117. As I have mentioned, it made no findings of fact on that or any other matter. But even if the generalized opinions of three former or current Senators constituted an institutional recognition that tax-exempt organizations conduct "electioneering activities" without being subject to FECA's limits, it would not matter. In relying on an anti-circumvention rationale, the defendants assume that "electioneering activities" like voter registration, get-out-the-vote drives and protected issue advocacy are properly the subject of FECA's limits. But such activities are *not* restricted under FECA, *see* 2 U.S.C. § 431(8)(A)(i) (regulated "contributions" include only donations made "for the purpose of influencing any election for Federal office"), for good reason—they *cannot* be restricted, constitutionally, given the conspicuous lack of evidence suggesting that they corrupt federal candidates or officeholders. *See Colorado Republican I*, 518 U.S. at 616-17, 623 (plurality opinion). Are we to presume (absent any evidence whatsoever) that candidates and officeholders are corrupted by "direct mail and phone bank campaign[s] involving four million calls and 19 million pieces of mail explicitly disputing [a] position on Medicare"? Gov't Br. at 117-18. I do not think there is anything inherently subversive about such activity, *see Renne*, 501 U.S. at 349 (Marshall, J., dissenting); *CIO*, 335 U.S. at 145 (Rutledge, J., concurring in judgment) ("'[U]ndue influence' . . . may represent no more than convincing weight of argument fully presented, which is the very thing the [First] Amendment and the electoral process it protects were intended to bring out."), and the defendants do not seriously contend that there is. Any "*potential* problems" associated with the transfer of *federal* funds from a party committee to a tax-exempt organization—" i.e., the creation of obligated officeholders, and of donors who feel compelled to contribute in order to obtain access to, and consideration from, federal officials," Gov't Br. at 118 (emphasis added)—



are insufficient to sustain section 323(d). *See NCPAC*, 470 U.S. at 498 (statute restricting expenditures of independent political committees unconstitutional because, on record before Court, "an exchange of political favors for uncoordinated expenditures remain[ed] a hypothetical possibility and nothing more"); *Tinker*, 393 U.S. at 508 ("undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression").

*Fourth*, section 323(d) prohibits any national, state or local political party committee from transferring any funds (federal or non-federal) to any section 527 organization *whether or not* that organization makes expenditures or disbursements "in connection with" a federal election. *See* BCRA § 101(a); FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2). For example, the provision prohibits the CDP from giving a single dollar—even for "very basic administrative and organizational costs"—to a local California Democratic club engaged solely in state-focused voter registration and get-out-the-vote activities. Bowler Decl. at 24-25. The government insists that the restriction can be justified "in light of the fungibility of money" and the fact that "receipt of such funds by an organization's treasury may effectively serve as a subsidy for other political activities during federal election years that benefit federal candidates." Gov't Reply Br. at 28. Not even the most expansive definition of "corruption" can accommodate the government's theory, however, because nothing in the record, or in law, even remotely suggests that those "other political activities"—such as voter registration, get-out-the-vote activity and issue advocacy—would corrupt any federal candidate. *See supra* Findings 80-82 at pages 180-193.

* * *

In sum, section 323(d) is an impermissible restriction on the expressive associational rights of party committees and their would-be donees. *See Tashjian*, 479 U.S. at 214-15

("[A] [p]arty's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. . . . [A] prohibition of potential association with nonmembers would clearly infringe upon the rights of the [p]arty's members under the First Amendment to organize with like-minded citizens in support of common political goals."); *see also Jones*, 530 U.S. at 574 (same). Prohibiting the transfer of funds from a party committee to a tax- exempt organization, to my way of thinking, does not serve the government's compelling interest in preventing actual or apparent corruption of candidates for federal office.[172] Even if it did, I believe section 323(d) would prohibit too much non-corrupting political speech. Accordingly, I would find the provision unconstitutional on its face.

4. Federal Candidates: New FECA Section 323(e)

Section 323(e) prohibits any federal candidate or officeholder from soliciting, receiving or transferring non-federal funds "in connection with" a federal, state or local election.[173]

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[172] Nor does prohibiting a party committee's *solicitation* of funds for a tax exempt organization—even if section 323(d)'s prohibition on transfers could be severed from its prohibition on solicitation, the latter would be invalid nonetheless (and whatever the standard of review) because it serves no legitimate governmental interest whatsoever.

[173] More specifically, section 323(e)(1) provides that a federal candidate or officeholder shall not

> (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, *including funds for any Federal election activity*, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or
>
> (B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—



*See* BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441i(e)(1). The provision admits of numerous exceptions, however, and so there are numerous ways in which a federal candidate or officeholder can participate in fundraising. Specifically, a candidate or officeholder may (1) solicit, receive or transfer *federal* funds, *see* BCRA § 101(a); FECA § 323(e)(1)(A), (B); 2 U.S.C. § 441i(e)(1)(A), (B); (2) "attend, speak, or be a featured guest at a fundraising event" for a state or local political party committee, BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3); (3) solicit unlimited non-federal funds on behalf of a tax-exempt 501(c) organization whose "principal purpose" is *not* to conduct voter registration, voter identification or get-out-the-vote activity if the "solicitation does not specify how the funds will or should be spent," BCRA § 101(a); FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A); and (4) solicit up to $20,000 per individual per calendar year *specifically for* voter registration, voter identification and get-out-the-vote activity, or for an organization

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> (i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of [FECA] section 315(a); and
>
> (ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441i(e)(1) (emphasis added). I would hold that section 301(20)'s definition of "Federal election activity" cannot be sustained. *See supra* Part IV.D.1.c. I believe, however, that section 323(e)(1)(A) can be read permissibly to exclude the non-essential phrase "including funds for any Federal election activity" because--in light of BCRA's severability clause, *see* BCRA § 401—"it appears both that, standing alone, legal effect can be given to [section 323(e)(1)(A)] and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy*, 264 U.S. at 290. Thus, under a congressionally-mandated saving construction, section 323(e)(1)(A) would provide that no federal candidate or officeholder shall "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act."

whose "principal purpose" *is* to conduct any or all of those activities, BCRA § 101(a); FECA § 323(e)(4)(B); 2 U.S.C. § 441i(e)(4)(B). It bears emphasizing that the plaintiffs do not challenge this provision with the same vigor as they do BCRA's other restrictions on non-federal funds. In three briefs, the *McConnell* plaintiffs spend scarcely more than a paragraph on the provision, arguing without full analysis that it "seriously impinges upon the right of free association between state and local committees and [federal] officeholders and candidates, many of whom until now played a significant role in state and local politics." McConnell Br. at 30. The *RNC* and *CDP* plaintiffs raise similar associational claims in lukewarm fashion, *see, e.g.*, RNC Br. at 41-42; CDP Br. at 42, and only incidentally assert that the provision unconstitutionally infringes a federal candidate's First Amendment right of solicitation, *see, e.g.*, CDP Br. at 39-40 (mentioning prohibition on candidate solicitation in conjunction with section 323(a) and 323(b)'s restrictions on national party leaders). I believe these claims lack merit,[174] *see infra,*

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[174] I would reject as well the *McConnell* plaintiffs' federalism claim and the *Thompson* plaintiffs' equal protection claim.

The *McConnell* plaintiffs allege that "[b]y restricting the activities of federal officeholders and candidates with respect to state and local election campaigns and processes, [section 323(e)] violates the Tenth Amendment and principles of federalism." McConnell Compl. at ¶ 115; *see* McConnell Br. at 23 (section 323(e) "dramatically limits the ability of federal officeholders and candidates to raise money for state and local candidates" where they would otherwise be permitted to do so under state law). While I express no opinion on the *McConnell* plaintiffs' other federalism challenges to BCRA's non-federal fund provisions, *see supra* Part III.A, I reject the notion that the Congress's power does not reach the solicitation and transfer of non-federal funds where a *federal candidate* is the one soliciting. *See* U.S. CONST. art. I, § 4, cl. 1 (granting Congress power to regulate "Times, Places and Manner of holding Elections for Senators and Representatives," except as to "the Places of chusing Senators"); *Burroughs*, 290 U.S. at 546-47 (recognizing broad congressional authority to regulate elections for President and Vice-President);



*see also* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to "regulate Commerce . . . among the several States"). The D.C. Circuit has held that the Tenth Amendment does not deny the federal government the authority to restrict municipal securities professionals from soliciting contributions for the political campaigns of state officials from whom they obtain business:

> [The regulation] neither compels the [S]tates to regulate private parties, as the Tenth Amendment prohibits, *New York v. United States*, 505 U.S. 144 (1992), nor regulates the [S]tates directly, a question on which the Supreme Court's Tenth Amendment jurisprudence "has traveled an unsteady path," *id.* at 160. Further, the rule does not have anything resembling the kind of preemptive effect on [S]tates' ability to control their own election processes that might be perceived as "destructive of state sovereignty." *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460-62 (1991).

*Blount*, 61 F.3d at 949. I believe that each of the D.C. Circuit's observations is applicable here and that the broader, more invasive power of the federal government to regulate *municipal securities professionals* who solicit funds for state officials includes the narrower power to regulate *federal candidates* who solicit funds for state officials.

With respect to the *Thompson* plaintiffs' claim that section 323(e) violates equal protection principles and the First Amendment by preventing them from competing effectively in the political process, *see* Thompson Compl. at ¶¶ 40-41, the government's response is sufficient:

> BCRA's restrictions on federal officeholders make no distinctions on the basis of race or any other suspect classification. The statute accords exactly the same treatment to all federal candidates, regardless of their race or ethnicity. Indeed, [the *Thompson*] plaintiffs allege no intent by Congress to discriminate on the basis of race; they allege only a "disproportionate effect" on "minority communities." Thompson . . . Compl. [at] ¶ 41. In the absence of intentional discrimination, however, plaintiffs can state no equal protection claim. *See, e.g., Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). And plaintiffs' claim of discrimination on the basis of wealth ignores the fact that equal protection principles do "not require absolute equality or precisely equal advantages," and do not "require the State to equalize economic conditions." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (citations omitted).

Gov't Br. at 127.

and I am inclined to agree with the RNC's assessment that because "[i]t is the corruption of federal officeholders and candidates—not the corruption of political parties—that the Supreme Court has recognized as a legitimate interest in its campaign finance cases," section 323(e) is the one component of BCRA section 101 that actually makes constitutional sense. *See* RNC Br. at 51; *see also* Oral Arg. Tr. Vol. 1, Morning Session, at 46 (RNC counsel arguing the same).

* * *

I first consider the standard by which the court is to review section 323(e). The plaintiffs contend that the provision should be subject to strict scrutiny because it drives an association-inhibiting wedge between political parties and their candidates, *see, e.g.*, McConnell Br. at 31 (citing, *inter alia*, *Jones*, 530 U.S. at 582; *Eu*, 489 U.S. at 231), and because restrictions on the solicitation of funds are always "subject to exacting First Amendment scrutiny," *e.g.*, CDP Br. at 40 (quotation omitted). The defendants argue, however, that section 323(e) passes muster if it is "closely drawn to further an important [c]ongressional interest." *E.g.*, Intervenors Opp. Br. at 23. The case law on the subject is mixed. *Compare Jones*, 530 U.S. at 582 (burden on political party's associational freedom is "unconstitutional unless it is narrowly tailored to serve a compelling state interest"), *with Colorado Republican II*, 533 U.S. at 448 n.10 (noting uncertain nature of political parties' associational rights under Court's First Amendment jurisprudence); *compare also Riley*, 487 U.S. at 788 (because solicitation "involve[s] a variety of speech interests . . . that are within the protection of the First Amendment," government's restriction thereof must be "narrowly tailored to achieve [its] principal asserted interest" (quotation omitted)), *with Schaumburg*, 444 U.S. at 632 ("Soliciting financial support is undoubtedly subject to *reasonable* regulation . . . ." (emphasis added)). In view of



unclear precedent, I would take the same cautious approach as the D.C. Circuit did in a fairly recent solicitation case:

> The proper categorization of [the regulation] is not clear-cut. . . . We are uncertain [about what level of scrutiny to apply.] . . . If the rule can withstand strict scrutiny there is no need to decide the issue. Accordingly we turn to applying such scrutiny and ask . . . whether the rule is narrowly tailored to serve a compelling government interest.

*Blount*, 61 F.3d at 942-43. For the following reasons, I agree with the defendants that section 323(e) is constitutional even if viewed through the lens of strict scrutiny. *See* Intervenors Opp. Br. at 23 n.55.

*First*, it is hardly a novel or implausible proposition that a federal candidate's solicitation of large donations from wealthy individuals, corporations and labor organizations—whether or not the funds are used "for the purpose of influencing" a federal election—can raise an *appearance* of corruption of the candidate. *See UAW*, 352 U.S. at 576 ("Many believe that when an individual or association of individuals makes large contributions . . . they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions . . . ." (quotation omitted)). Accordingly, I am more willing in the candidate context than in the party context to consider the defendants' generalized, anecdotal evidence in support of BCRA's restrictions. *See Shrink Missouri*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Moreover, I believe the evidence is sufficient for the court to conclude that section 323(e) may alleviate, "in a direct and material way," *Turner*, 512 U.S.

at 664, at least the appearance of federal candidate and officeholder corruption:

- Gerald Greenwald, the former Chairman and CEO of United Airlines, testified that "sitting Members of Congress . . . who solicit large corporate contributions sit on committees that directly affect the corporation's business. Similarly, these Members' actions affect issues of interest to labor unions[,] . . . from tax legislation to industry deregulation, to environmental legislation, to list just a few examples." Greenwald Decl. at 3.

- Wade Randlett, CEO of Dashboard Technology, hosted and helped organize over 100 fundraising events featuring federal candidates and officeholders from 1996 to 2000, and "raised seven-digit sums in both federal funds . . . and non-federal funds." Randlett Decl. at 2. Randlett testified that "[t]he core transaction is an elected official talking to an individual who may write a soft money check in order to receive positive attention for an issue. When you take that out of the equation, a great deal of the inappropriate influence leaves the system." *Id.* at 6.

- Senator McCain testified that "Members of Congress interact with donors at frequent fundraising dinners, weekend retreats, cocktail parties, and briefing sessions that are held exclusively for large donors . . . . When, as a result of a Member's solicitation, someone makes a significant soft money donation, and then the donor calls the Member a month later and wants to meet, it's very difficult to say no, and few of us do say no." McCain Decl. at 3-4; *but cf.* McCain Dep. at 236-38 (acknowledging that he could not "recall any of the individuals who were present" at fundraising events and that no donor "made enough of an impression . . . to influence any legislative judgments").



- Senator Zell Miller once publicly described how he "locked himself in a room with an aide, a telephone, and a list of potential contributors. The aide would get the 'mark' on the phone, then hand me a card with the spouse's name, the contributor's main interest, and a reminder to 'appear chatty.' I'd remind the agribusinessman that I was on the Agriculture Committee; I'd remind the banker I was on the Banking Committee. And then I'd make a plaintive plea for soft money. . . . I always left that room feeling like a cheap prostitute who'd had a busy day." 147 CONG. REC. S2445 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold) (quoting Zell Miller, *A Sorry Way to Win,* WASH. POST, Feb. 25, 2001, at B7).

- Defense expert Robert Shapiro testified about a recent survey "reveal[ing] that fully 77 percent of the public in 2001 [viewed] the way in which candidates raised money as unethical if not fully corrupt, with 31 percent viewing [it] as corrupt." Shapiro Expert Report at 12; *but cf.* Ayres Rebuttal Report at 4-5 (appearance of corruption stems not only from large donations of non-federal funds but of federal funds as well).

These statements (and others in the record like them) are hardly evidence that federal candidate and officeholder solicitation of non-federal funds results in actual *quid pro quo* corruption. But in severing the most direct link between the federal candidate and the non-federal donor, *see* Gov't Br. at 123, section 323(e) can serve to prevent the appearance of corruption where it is most acute. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) ("[W] e cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate."). Although the defendants have

again offered the court no *empirical* evidence, "no smoking gun is needed where, as here, the conflict of interest is apparent." *Blount*, 61 F.3d at 945.

*Second*, if BCRA's "key purpose" is indeed to prevent "the use of soft money as a means of buying influence [over] federal officials," *e.g.*, 148 CONG. REC. H408 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); *see also, e.g.*, Meehan Dep. at 128 ("My view is that the appearance of corruption comes from the totality of the system that allows *federal officials* to raise unlimited amounts of money . . . ." (emphasis added)), section 323(e) may be the least restrictive means of meeting the objective. Unlike sections 323(a), (b) and (d)—which target non-corrupting, core political activities of national, state and local political party committees, *see supra* Parts IV.D.1 and IV.D.3—section 323(e) does not unnecessarily inhibit protected political speech or association. It is true that by limiting a federal candidate or officeholder's solicitation of non-federal funds, section 323(e) burdens his association with the party with whom he is linked by ideology and with whom he engages "in the common enterprise of electing candidates up and down the ticket." CDP Br. at 40. Nonetheless, the provision leaves him free to associate with his party—and with other like-minded organizations—in significant ways. As I have mentioned, he may still solicit, receive or transfer *federal* funds, *see* BCRA § 101(a); FECA § 323(e)(1)(A), (B); 2 U.S.C. § 441i(e)(1)(A), (B); "attend, speak, or be a featured guest at a fundraising event" for a state or local political party committee, BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3); solicit unlimited non-federal funds on behalf of a tax-exempt 501(c) organization whose "principal purpose" is *not* to conduct voter registration, voter identification or get-out-the-vote activity if the "solicitation does not specify how the funds will or should be spent," BCRA § 101(a); FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A); and solicit up to $20,000 per individual per calendar year *specifically for* voter registration, voter



identification and get-out-the-vote activity, or for an organization whose "principal purpose" *is* to conduct any or all of those activities, BCRA § 101(a); FECA § 323(e)(4)(B); 2 U.S.C. § 441i(e)(4)(B). Thus, section 323(e) "permits federal candidates to solicit money in connection with state or local elections, but minimizes the dangers of corruption" by setting source-and-amount limits analogous to those in FECA. Gov't Br. at 125. To my way of thinking, this moderate cap on federal candidate and officeholder solicitation is not nearly so troubling as an outright ban would be. The Court has held that solicitation

> involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that *without* solicitation the flow of such information and advocacy would likely cease.

*Schaumburg*, 444 U.S. at 632 (emphasis added). Because section 323(e) does not flatly prohibit a federal candidate or officeholder from soliciting campaign funds, it does not preclude him from expressing the full range of his "particular views on economic, political, or social issues." *Id.* Whether he is soliciting $10 or $10,000—or for that matter, whether he is soliciting federal or non-federal funds—a candidate or officeholder may, as vigorously as he wishes, "seek[ ] support for particular causes." *Id.* The provision therefore seems to present little danger of stifling the flow of candidate-to-donor advocacy; I would conclude that it is no more restrictive of

political speech than may be necessary to prevent apparent corruption of the federal candidates and officeholders it regulates.

* * *

Section 323(e), therefore, is consistent with the First Amendment's guarantees[175] and, I believe, must be sustained.

5. State Candidates: New FECA Section 323(f)

Under new FECA section 323(f), a state candidate or officeholder "may not spend any funds for a communication described in section 301(20)(A)(iii) unless the funds are subject to the limitations, prohibitions, and reporting requirements" of the Act. BCRA § 101(a); FECA § 323(f); 2 U.S.C. § 441i(f); *see also* BCRA § 101(b); FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). In light of my conclusion that FECA section 301(20) cannot be sustained, *see supra* Part IV.D.1.c, I would conclude as well that no coherent legal effect can be given to section 323(f), which I would strike down on the ground of inseverability. *See Dorchy*, 264 U.S. at 290 (statutory provision "cannot be deemed separable unless it appears . . . that, standing alone, legal effect can be given to it"); *cf. supra* Part IV.D.2.

*E. The Ban on Minors' Contributions and Donations*

Turning finally from BCRA section 101's restrictions on non-federal funds, I next examine BCRA section 318, which, as the *Echols* plaintiffs' counsel aptly observed at oral

[175] This includes the guarantee of a free press. The *Paul* plaintiffs claim that section 323(e) violates their right to a free press to the extent that it prohibits Representative Paul from "signing solicitation letters on behalf of" Gun Owners of America, Citizens United or Real Campaign Reform.org. Paul Br. at 18-19. But because the provision narrowly may serve the government's compelling interest in preventing the appearance of corruption—and does not exert "editorial control" on anyone's press activities, *id.* at 18 (capitalization altered)—the *Paul* plaintiffs' free press claim is without merit.



argument, "falls into the category of 'who knows where it came from.'" Oral Arg. Tr. Vol. 2 at 326 (counsel for *Echols* plaintiffs). Section 318 bans any person under the age of 18 from making (1) any contribution whatsoever to any federal candidate; or (2) any contribution or non-federal "donation" to a political party committee. BCRA § 318; FECA § 324; 2 U.S.C. § 441k ("An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party."). The *McConnell* and *Echols* plaintiffs contend that the provision runs afoul of the First Amendment. *See* McConnell Br. at 91-95; McConnell Opp. Br. at 59-61; McConnell Reply Br. at 47-48. For the following reasons, I agree.[176]

* * *

It is well-settled that minors are entitled to the full range and force of the First Amendment's guarantees. *See Tinker*, 393 U.S. at 511-13; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *cf. Bellotti*, 435 U.S. at 784- 85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the *speakers* who may address a public issue." (emphasis added)). While the Supreme Court's case law reflects that the government often possesses an especially strong interest in regulating the activities of minors, *see, e.g., Ginsberg v. New York*, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" (quoting *Prince v.*

[176] Accordingly, I would not reach the *McConnell* and *Echols* plaintiffs' claim that the ban violates the Fifth Amendment's equal protection component, *see* McConnell Br. at 95, nor would I decide the *Thompson* plaintiffs' claim that the provision violates their First and Fifth Amendment rights to the extent that it prevents them from "protect[ing] the rights" of their minor constituents, Thompson Compl. at ¶ 48.

*Massachusetts*, 321 U.S. 158, 170 (1944))), no case of which I am aware holds that a minor's speech is less valuable to himself—or to the political marketplace—simply because of his youth. Therefore, the fact that section 318 restricts the speech of minors as opposed to adults does not affect the standard by which the court is to review the provision.

I believe section 318 is subject to strict scrutiny for the same reasons I have strictly scrutinized BCRA's limits on non-federal donations to political party committees—the ban operates to restrict the political speech of minors who would donate non-federal funds to the political parties in order to participate in collective advocacy *via* independent party expenditures. *See* BCRA § 318; FECA § 324; 2 U.S.C. § 441k ("An individual who is 17 years old or younger shall not make a . . . *donation* to a committee of a political party." (emphasis added)); *see also Citizens Against Rent Control*, 454 U.S. at 296-97, 299; *see generally supra* Part IV.D.1.a. Because the plaintiffs do not press this point at any sustained length,[177] however, and because the government has not even demonstrated under *Buckley*'s contribution-to-candidate standard of review that section 318 serves "a sufficiently important interest" by means "closely drawn to avoid unnecessary abridgement of [First Amendment] freedoms," *Buckley*, 424 U.S. at 25, there is no need to decide whether strict scrutiny or "*Buckley* scrutiny" applies. *Cf. Blount*, 61 F.3d at 942-43 (where outcome of First Amendment challenge does not depend upon standard of review, no need to settle upon applicable standard).

*First*, section 318 does not serve *any* governmental interest, much less a "sufficiently important" or "compelling" one.

[177] *But see* McConnell Br. at 95 n.48 ("To the extent that section 318 not only limits contributions of federally regulated funds to candidates and party committees, but also limits donations of *state-regulated* funds to party committees, it is also unconstitutional for the reasons given above in [the discussion of BCRA section 101]." (emphasis in original)).



Repeatedly citing one floor statement of one Senator, the government claims the "Congress recognized that some parents use their influence over their children and their control over their children's assets to circumvent the limits on contributions to candidates and parties." Gov't Br. at 199 (citing 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (provision added "to prevent evasion of the contribution limits")). The court is told that "[t]he need for the prophylactic measure adopted by Congress here is clear." *Id.* at 200. But the government's evidence of corruption-by-conduit, *see id.* at 200-02 & nn.137-141, is remarkably thin:

- A decade-old FEC report to the Congress states without further explanation that "contributions are sometimes given by parents in their children's names." FED. ELECTION COMM'N, ANNUAL REPORT 1992, at 64 (1993).
- The Thompson Committee Report resulting from an investigation of "improper activities in connection with 1996 federal election campaigns" states—once again, without further explanation—that "[t]here is . . . substantial evidence that minors are being used by their parents, or others, to circum vent the limits imposed on contributors." Thompson Comm. Rep. at 4506.
- Senator Dodd, "an experienced fundraiser," Gov't Br. at 201 n.138, stated on the Senate floor that "[n]ormally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions." 147 CONG. REC. S2933 (daily ed. Mar. 27, 2001) (statement of Sen. Dodd).
- Articles ranging from "The Kiddie-Cash Caper" on *Slate.com* to "The Young and the Generous" in the

*Washington Post* have asserted that "gifts from minors are the next big campaign loophole." Gov't Br. at 201 n.139 (capitalization altered).

- Senator McCain, relying on other newspaper articles, reported on the Senate floor that "some" contributions have been made by infants and toddlers, although he provided no examples. 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). He cited only two adolescents' contributions specifically. *See id.* (stating *Los Angeles Times* "found that two high school sisters contributed $40,000 to the Democratic Party in 1998" based on a "'family decision"').

Were I convinced by the government's evidence that "wealthy individuals are easily circumventing contribution limits . . . by directing their children's contributions," 148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)—and I am not—section 318 does nothing more to alleviate the problem than do federal laws already on the books. FECA prohibits any person from "mak[ing] a contribution in the name of another person" or "knowingly accept[ing] a contribution made by one person in the name of another person." 2 U.S.C. § 441f. And an FEC regulation that remained in effect until January 1, 2003 ensured that a minor child could make a contribution only if he did so "knowingly and voluntarily," with "funds, goods, or services . . . owned or controlled exclusively" by him, and *not* with "the proceeds of a gift, the purpose of which was to provide funds to be contributed." 11 C.F.R. § 110.1(i)(2). By the government's own admission, all section 318 adds to the statutory landscape is a provision that will (we are told) be easier to administer than existing laws:

> [C]ontributions by minors of all ages, even adolescents, present . . . practical difficulties. The Commission either can accept at face value self-serving, conclusory, and sometimes lawyer-crafted statements of family members, or it can probe for the truth by querying youngsters about their knowledge of politics and their relationship with their parents in ways that may threaten the privacy of the family.



Gov't Br. at 207. The government's "interest" in the smoothest possible enforcement of campaign finance restrictions is not one articulated in the legislative record. *See* 148 CONG. REC. S2145-48 (daily ed. Mar. 20, 2002). Neither is it one the Supreme Court has recognized as "sufficiently important" or "compelling" to justify limiting campaign contributions (much less banning them), *see NCPAC*, 470 U.S. at 496-97, nor one I am prepared to accept for the first time today, *see Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("[W]hen we enter the realm of strict judicial scrutiny, there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." (quotations omitted)).

*Second*, even if section 318 served to prevent actual or apparent corruption of federal candidates in a material way not served by existing law, the provision could not be sustained because—far from being "closely drawn" or "narrowly tailored"—it is grossly overbroad. The government contends "[i]t makes no difference that § 318 is a limited prohibition of contributions rather than a limit on their dollar amount." Gov't Opp. Br. at 125 n.133. I disagree; that section 318 is a prohibition makes *all* the difference. True, the Court has rejected the argument that the Act's $1,000 contribution ceiling employs "unrealistically low" dollar limits and has held that the "Congress' failure to engage in . . . fine tuning does not invalidate the legislation." *Buckley*, 424 U.S. at 30 (dismissing assertion that "much more than [$1,000] would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder"). And the Court has reminded us that we have "no scalpel to probe, whether, say, a $2,000 ceiling might not

serve as well as $1,000." *Id.* (quoting *Buckley*, 519 F.2d at 842). But the Court has also taught us that in the contribution-to-candidate context, "distinctions in degree become signify-cant . . . when they can be said to amount to differences in kind." *Id.* The Congress's decision to enact a prophylactic ban on minors' contributions rather than capping them was not one that involved "fine tuning." *Buckley* makes clear that "[a] *limitation* on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution." *Id.* at 21 (emphasis added). In contrast, section 318 prohibits even the "symbolic expression" of a minor donor's support for a candidate, whether or not (1) the minor makes a contribution or donation from funds he has earned himself, *see supra* Findings 83-84 at page 194; (2) the minor's parents have "maxed out" on their federal contributions and might therefore seek to use the minor as a conduit contributor, *see supra* Finding 84 at page 194; (3) the contribution or donation is *de minimis* and cannot even remotely corrupt or appear to corrupt any federal candidate; or (4) the minor makes a non-federal donation to a *state* political party committee that spends the funds on voter registration, voter identification, get-out-the-vote activity or issue advocacy relating solely to *state* candidates. The government defends section 318 by calling the prohibition "limited" and pointing out that it leaves open alternative channels for a minor's speech. *See* Gov't Br. at 204-05 (minors may still "volunteer their services to a candidate for federal office or to a political committee," "make unlimited independent expenditures to express their views" and "contribute to independent political committees"). Under long-standing First Amendment principles, however, this is no defense at all. *See Texas v. Johnson*, 491 U.S. 397, 416 n.11 (1989) (rejecting notion that defendant's flag-burning could be criminalized simply because "his act . . . conveyed nothing that could not have been conveyed . . . just as forcefully in a



dozen different ways" (quotation omitted)); *Riley*, 487 U.S. at 791 ("[S] peakers, not the government, know best both what they want to say and how to say it."); *Schneider*, 308 U.S. at 163 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

* * *

Notwithstanding the government's insupportable assertions to the contrary, *see, e.g.*, Gov't Opp. Br. at 124 (section 318 embodies "a reasonable policy choice by Congress [that] easily survives judicial review"), the minors' ban reflects a profound congressional disregard of the First Amendment and settled jurisprudence thereunder. I would hold that the provision is invalid on its face.

*F. The Conditions on the Lowest Unit Broadcast Charge*

Until the enactment of BCRA section 305, the Federal Communications Act (FCA) required a licensed broadcast station to provide a federal candidate—during the 45 days preceding a primary or runoff election and during the 60 days preceding a general or special election—the benefit of the "lowest unit charge of the station" on any broadcast advertisement "in connection with" the candidate's campaign. FCA § 315(b); 47 U.S.C. § 315(b). BCRA section 305 amends the FCA to deny a candidate the lowest unit charge unless the candidate either certifies in writing that he will not "make any direct reference to another candidate for the same office," BCRA § 305(a)(3); FCA § 315(b)(2)(A); 47 U.S.C. § 315(b)(2)(A), or, if he does so refer, he includes a statement in the advertisement clearly identifying himself, *see* BCRA § 305(a)(3); FCA § 315(b)(2)(C), (D); 47 U.S.C. § 315(b)(2)(C), (D). The *McConnell* plaintiffs challenge section 305 on First Amendment free speech grounds, claiming that it impermissibly "condition[s] the cost of advertisements on their viewpoint." McConnell Br. at 89 (capitalization

altered). I believe that we lack Article III jurisdiction to consider their claim, however, and I would not pass upon it or upon the constitutionality of section 305.

* * *

Under Article III of the United States Constitution, our "judicial Power" extends only to live "Cases" or "Controversies." U.S. CONST. art. III. As the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "an essential and unchanging part of the case-or-controversy requirement of Article III" is the "core component" of standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." . . .
>
> The party invoking federal jurisdiction bears the burden of establishing these elements. . . . Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. . . . In response to a motion for summary judgment, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" byaffidavit or other evidence "specific facts." . . . And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."



*Lujan*, 504 U.S. at 560-61 (citations omitted). I believe that the *McConnell* plaintiffs—the only plaintiffs in these consolidated actions who challenge section 305—are unable on the record before us to carry their burden of establishing that the provision causes them an "actual or imminent, not 'conjectural' or 'hypothetical'" injury sufficient to confer standing. *Id.*

Section 305 applies exclusively to candidates for federal office. Thus, only three of the *McConnell* plaintiffs—Senator McConnell, Representative Pence and former Representative Barr—are conceivably affected by the provision.[178] *See* McConnell Compl. at ¶¶ 15-17. Neither Pence nor Barr has alleged or provided evidence that he intends in a future campaign to run a broadcast advertisement that will both "make any direct reference to another candidate for the same office," BCRA § 305(a)(3); FCA § 315(b)(2)(A); 47 U.S.C. § 315(b)(2)(A), and omit his own identification, *see* BCRA § 305(a)(3); FCA § 315(b)(2)(C), (D); 47 U.S.C. § 315(b)(2)(C), (D). Indeed, Representative Pence testified that he ran nine advertisements during the period from January 1, 1999 to December 31, 2001, *see* Resp. of Rep.

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[178] To the extent that any of the other individual plaintiffs in the *McConnell* action might someday become federal candidates, my observation that Senator McConnell, Representative Pence and former Representative Barr (all of whom might in the future *again* become federal candidates) are the only plaintiffs "conceivably" affected by section 305 is something of an overstatement. Nevertheless, like the Senator and the two Congressmen, none of these plaintiffs has alleged (much less adduced "specific facts" to demonstrate) "actual or imminent injury" stemming from section 305.

Pence to Defs.' First Set of Interrogs. at 6-7, that none of the ads "made direct reference to another [c] andidate for the same office," *id.*, and that he does not "believe that [he] will wage a campaign differently . . . after BCRA than [he] did before," Pence Dep. at 36. And although Senator McConnell has testified without contradiction that in the future he intends to run campaign ads critical of his opponent and "will be subject to . . . BCRA's discriminatory penalty for doing so," McConnell Aff. at 8, he is not "*immediately* in danger of sustaining some direct injury as [a] result" of section 305, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (emphasis added), because the earliest date he could feel the effect of the provision is 45 days before the Republican primary election in 2008. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (under Article III, litigant must "clearly demonstrate" injury is "imminent" in "temporal sense") (quoted in *Lujan*, 504 U.S. at 560). Accordingly, I would hold that no plaintiff has constitutional standing to challenge the provision.

The *McConnell* plaintiffs resist this conclusion on two interrelated grounds. They observe that BCRA section 403(c) specifically contemplates a facial challenge to any provision of the statute by any member of the Senate, *see* McConnell Reply Br. at 46 n.28, and they argue that, under relaxed First Amendment standing rules, Senator McConnell has standing to challenge section 305 "on a facial basis with respect to all its unconstitutional applications," *id.* Neither assertion is availing. First, while I recognize the importance of effectuating the Congress's clearly-expressed intent to resolve expeditiously and in a single proceeding any facial challenge to the statute, *see* BCRA § 403(a), the legislature cannot grant us authority we are not constitutionally entitled to exercise. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *see also*



*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996) (it is "fundamental that Congress [may] not expand the jurisdiction of the federal courts beyond the bounds of Article III" (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))). That BCRA permits "[a]ny Member of Congress [to] bring an action . . . for declaratory or injunctive relief to challenge the constitutionality of any [of its] provision[s]," BCRA § 403(c), is therefore beside the point with respect to Article III standing to challenge section 305. Second, the relaxed standing rules to which the plaintiffs refer, *see* McConnell Reply Br. at 46 n.28 (citing *Gooding v. Wilson*, 405 U.S. 518, 520 (1972)), are applicable only to claims of First Amendment *overbreadth* (like the many I addressed *supra* at Parts IV.A to IV.E). The overbreadth doctrine embodies an exception to the general rule against third-party standing, *see Board of Trustees v. Fox*, 492 U.S. 469, 482-83 (1989), one that may be invoked only where there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801-02; *see generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 202-13 (4th ed. 1996) (discussing relation of overbreadth and standing doctrines). The case on which the plaintiffs rely for a relaxed standard makes clear that the overbreadth doctrine is generally reserved for situations in which potential speakers "may well refrain from exercising their rights for fear of *criminal sanctions* provided by a statute susceptible of application to protected expression." *Gooding*, 405 U.S. at 521 (emphasis added). Unlike the provisions analyzed above, however, *see supra* Parts IV.A to IV.E, section 305 imposes no criminal sanction for a violation thereof. Instead, it simply denies the lowest rate to a federal candidate who runs a broadcast advertisement (1) referring to another candidate for the same office, and (2) omitting the speaker's identification. *See* BCRA § 305(a)(3); FCA

§ 315(b)(2); 47 U.S.C. § 315(b)(2). Whatever other First Amendment infirmities may accompany section 305, the provision raises only a marginal danger of chilling the speech of parties not before the Court. *See Taxpayers for Vincent*, 466 U.S. at 801. Thus, in my view, the court cannot ignore the standard jurisdictional requirements of Article III to consider the plaintiffs' challenge, nor has it any authority to say anything more on the matter. *See Steel Co.*, 523 U.S. at 94.

### *G. Increased Contribution Limits*

BCRA contains two sets of provisions that increase the contribution limits of the Act. *See supra* Part II.G. I would hold that no plaintiff who challenges either set of provisions has standing to do so.

#### 1. General Increases

In sections 102 and 307, BCRA (1) raises the Act's "hard money" ceilings by permitting individual donors to contribute greater amounts to candidates and national and state political party committees, *see* BCRA §§ 102, 307; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1); and (2) indexes for inflation all but the Act's $10,000 limit on an individual's contributions to a state political party committee and the $5,000 cap on an individual's contributions to "any other political committee," *see* BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c); *see generally supra* Part II.G.1. The *Adams* plaintiffs claim that the higher ceilings violate the equal protection component of the Fifth Amendment by "multiplying the hard money contributions of the wealthy" and thereby "depriv [ing] non-wealthy voters and candidates of the ability to participate" in the electoral process "on an equal basis" and with a "meaningful voice." Adams Br. at 9 (capitalization altered); Adams Opp. Br. at 5. In passing, the *CDP* and *Paul* plaintiffs raise similar claims with respect to BCRA's failure to index for inflation the Act's limits on contributions to state political



party committees and "other political committee[s]." *See* CDP Br. at 50 ("By . . . severely disadvantaging state and local party committees [in] their ability to engage in political communication and otherwise participate in the political process, BCRA deprives [them] of the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment."); Paul Br. at 27 n.11 (arguing that "disparate treatment" of political action committees with respect to increases and indexing violates freedom of press). None of these plaintiffs, however, has Article III standing to challenge the general increases or indexing.

Under Article III, the plaintiffs must set forth "specific facts"—as opposed to "mere allegations"—establishing the elements of constitutional standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Lujan*, 504 U.S. at 560-61 (alterations in original) (citations omitted). To my mind, no plaintiff has carried his burden. Indeed, the *Adams* plaintiffs have failed on at least two elements. First, they have not suffered an invasion of a *legally protected* interest. As the Eleventh Circuit recently held—in finding that the plaintiffs had no standing to raise an equal protection claim identical to that of the *Adams* plaintiffs—no one has a "right to equal influence in the overall electoral process." *Ga. State Conference of NAACP Branches v. Cox*,

183 F.3d 1259, 1263-64 (11th Cir. 1999) (quoting *MCFL*, 479 U.S. at 257 ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.")). And none of the *Adams* plaintiffs has been, or conceivably will be, stripped of his right to vote or of access to the ballot. Second, even if one of the plaintiffs did suffer such an injury, it would not be "fairly . . . trace[able]" to BCRA. *Lujan*, 504 U.S. at 560. As the Second Circuit has observed—once again, in finding that the plaintiffs had no standing to raise an equal protection claim identical to that of the *Adams* plaintiffs—contribution limits, high or low, do not "*require* that contributions be made to any candidate." *Albanese v. FEC*, 78 F.3d 66, 68 (2d Cir.) (emphasis added), *cert. denied*, 519 U.S. 819 (1996). Thus, any inequality the *Adams* plaintiffs may suffer would be at the hands of other individuals, not BCRA. *See Cox*, 183 F.3d at 1264 (plaintiffs' "alleged inability meaningfully to participate in and influence elections is attributable to the conduct and resources of private individuals, not the state"); *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997) (rejecting equal protection claim similar to that of *Adams* plaintiffs because "no state action put[s] wealthy voters in a better position to contribute to campaigns than nonwealthy voters"), *cert. denied*, 525 U.S. 813 (1998); *see also Kruse v. City of Cincinnati*, 142 F.3d 907, 917 n.17 (6th Cir.) (rejecting equal protection argument similar to that of *Adams* plaintiffs and refusing to "attribute societal differences in income or the high cost of running a . . . campaign to the State" (quoting *NAACP, Los Angeles Branch*, 131 F.3d at 1323)), *cert. denied*, 525 U.S. 1001 (1998); Gov't Br. at 209 (aptly describing plaintiffs' "real claim" as notion that "the Constitution requires the government to prevent other citizens from raising and contributing more than they do"); *cf. Citizens Against Rent Control*, 454 U.S. at 295 ("*Buckley* . . . made clear that contributors cannot be protected from the possibility that others will make larger contributions[.]").



Relying upon a wealth of inapposite voting rights cases, the *Adams* plaintiffs insist they have standing to raise their "meaningful voice" claim. Adams Opp. Br. at 1-5; *see Buckley*, 424 U.S. at 49 n.55 (voting rights cases do not support "abridg[ing] the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society"). In doing so, however, they confront none of the case law I have just discussed.[179]

For the same reasons, the *CDP* and *Paul* plaintiffs lack standing to challenge BCRA's failure to index certain contribution limits for inflation. Additionally, in the less than two pages of collective briefing on the matter, *see* CDP Br. at 50; Paul Br. at 27 n. 11, neither the *CDP* nor the *Paul* plaintiffs have cited to us any "specific facts," *Lujan*, 504 U.S. at 561, tending to show that BCRA's indexing scheme will "severely disadvantag[e]" them in "their ability to engage in political communication," CDP Br. at 50. Their "mere allegations," *see, e.g.*, Boos Decl. at 14 (indexing scheme "arbitrarily limit[s]" Citizens United Political Victory Fund's "activities in supporting or opposing federal candidates" and "unfairly discriminate[s] against" Fund); Pratt Decl. at 22 (indexing scheme "arbitrarily limit[s]" Gun Owners of America Political Victory Fund's "activities in supporting or opposing federal candidates" and "unfairly discriminate[s] against" Fund), are insufficient to confer constitutional standing at this (the trial) stage of the litigation. *Lujan*, 504 U.S. at 561.

2. The "Millionaire Provisions"

Likewise, neither the *Adams* plaintiffs nor the *RNC* plaintiffs have constitutional standing to challenge BCRA's so-

[179] The plaintiffs' failure even to *acknowledge* the applicable case law until their reply brief—in which they curtly dismiss any reliance upon it as "misplaced," Adams Reply Br. at 4—is disturbing given that counsel for the *Adams* plaintiffs represented the unsuccessful equal protection claimants in each of the four circuit decisions cited above.

called "millionaire provisions," which collectively provide for a series of staggered increases in otherwise applicable contribution-to-candidate and coordinated expenditure limits if the candidate's opponent spends a "personal funds amount" over a sum certain. *See* BCRA § § 304, 316, 319; FECA § 315(i); 2 U.S.C. § 441a(i); *see generally supra* Part II.G.2.

As they did with respect to section 307, the *Adams* plaintiffs claim that the millionaire provisions violate the equal protection component of the Fifth Amendment by "multiplying the hard money contributions of the wealthy" and thereby "depriv[ing] non-wealthy voters and candidates of the ability to participate" in the electoral process "on an equal basis" and with a "meaningful voice." Adams Br. at 9 (capitalization altered); *see id.* at 17-18; Adams Opp. Br. at 5, 8-9.For reasons I have already explained, *see supra* Part IV.G.1, the *Adams* plaintiffs are unable to carry their Article III burden of demonstrating that they have suffered or will imminently suffer "an invasion of a legally protected interest" which is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations in original) (citations omitted). Moreover, none of the *Adams* plaintiffs is a candidate in an election affected by the millionaire provisions—i.e., one in which an opponent chooses to spend the triggering amount in his own funds—and it would be purely "conjectural" for the court to assume that any plaintiff ever will be. *Id.* at 560, 562 (noting difficulty in establishing standing if one or more of essential elements "depends on the unfettered choices made by independent actors . . . whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict" (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989))).

Raising an equal protection claim of their own, the *RNC* plaintiffs contend that the millionaire provisions "discriminate among similarly situated federal candidates." RNC Br.



at 73 (capitalization altered); *see id.* at 73-75. Yet none of the RNC plaintiffs *is* a federal candidate. Mike Duncan, the only individual plaintiff in the *RNC* action, does not allege that he will ever be a federal candidate, much less a candidate running in an election affected by the millionaire provisions. *See* RNC Compl. at ¶ 20; *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (plaintiff "must allege in his pleading the facts essential to show jurisdiction"). And to the extent the *RNC* plaintiffs allege that the provisions "interfere[ ] with the right of political party committees to support and associate equally with their candidates," RNC Compl. at ¶ 74—a claim nowhere argued in their briefs—they will suffer no injury "fairly . . . trace[able]" to BCRA because even in circumstances where the provisions *permit* a party committee to engage in unlimited coordinated spending, they do not *require* a committee to do so. *See Albanese*, 78 F.3d at 68.

* * *

I would hold that on the record and pleadings before us, we lack jurisdiction to entertain any of the plaintiffs' challenges to BCRA's general increased contribution limits and millionaire provisions. I would therefore refrain from deciding the provisions' constitutionality. *See Steel Co.*, 523 U.S. at 94.

## V. Conclusion

For the reasons stated in Parts III and IV of this opinion, I believe that all of the challenged provisions of BCRA—except the one discussed in Part IV.D.4 (which, in my view, must be sustained) and those discussed in Parts IV.F and IV.G (as to which I would pass no judgment)—violate the First Amendment to the United States Constitution. Accordingly, I would permanently enjoin the defendants and their agents from enforcing, executing or otherwise applying sections 201, 202, 203, 204, 212, 213, 214, 311, 318 and 504

of BCRA, and from enforcing, executing or otherwise applying new FECA sections 301(20), 323(a), 323(b), 323(c), 323(d) and 323(f), as added by section 101 of BCRA.